Applicant Details

First Name	**Alex**
Middle Initial	**K**
Last Name	**Boutelle**
Citizenship Status	**U. S. Citizen**
Email Address	**boutelle.alexandra@gmail.com**
Address	**Address** Street **2834 N. Heather Pl.** City **Boise** State/Territory **Idaho** Zip **83702-1427** Country **United States**
Contact Phone Number	**5073586631**

Applicant Education

BA/BS From	**Northwestern College**
Date of BA/BS	**August 2016**
JD/LLB From	**Pepperdine University School of Law** **http://law.pepperdine.edu/**
Date of JD/LLB	**May 14, 2021**
Class Rank	**15%**
Law Review/Journal	**Yes**
Journal(s)	**Pepperdine Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**

Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Saxer, Shelley
shelley.saxer@pepperdine.edu
310-506-4657

Goodno, Naomi
naomi.goodno@pepperdine.edu
310-506-4178

Hunt, Nancy
Nancy.hunt@Pepperdine.edu
703-4004827

This applicant has certified that all data entered in this profile and any application documents are true and correct.

September 03, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

Please accept my enclosed application for a clerkship in your chambers for the 2021-2023 term. I am a rising third-year law student at Pepperdine University Caruso School of Law and I want to clerk because I know that your mentorship will hone my ability to craft an effective legal argument. Close observation of statute interpretation will enrich my understanding of aviation law, making me an excellent advocate in my chosen specialty. I am enclosing my resume, transcript, recommendation letters, and writing sample for your review. I am especially interested in this clerkship because I grew up in Minnesota and want to serve the state by practicing law there.

I decided to attend law school because I am passionate about transportation safety and conscientious rulemaking. As a flight attendant, I was intrigued by the complex interplay between the NTSB and FAA. Realizing some recommendations from NTSB reports were omitted from federal aviation regulations, I began pursuing a legal career to prevent future accidents. A clerkship will develop the judicial insight necessary to anticipate courts' interpretation of new statutes and regulations so that I can remedy gaps in passenger safety. If selected for this position, I will work hard to learn all that I can about judicial decision-making and court processes so that I can provide effective counsel for passengers, airlines, and transportation agencies.

I have exceptional skills that will be an asset to your chambers, evidenced by an outstanding academic record, extensive writing training, and practical experience in analyzing fact patterns. Not only can I extract important details from reams of research material, but I can transform this information into insightful, fact-to-fact analysis. My strict attention to detail and thorough knowledge of Bluebook rules have enabled me to update case law citations for military field manuals and to excel in Law Review editing duties, earning me a position as an associate editor.

Thank you for your consideration of this application, and I hope to have the opportunity to discuss the clerkship further in person.

Sincerely,

Alexandra Boutelle

Enclosures

ALEXANDRA BOUTELLE

16231 Excelsior Drive • Rosemount, MN 55068
(507) 358-6631 • alexandra.boutelle@pepperdine.edu

EDUCATION

Pepperdine University School of Law — Malibu, CA
Juris Doctor Candidate — May 2021

- GPA: 3.65, 20/133 (top 15%)
- Honors: Judge Barry Russell Federal Bar Association Award for Excellence in the Field of Federal Practice (2020), Dean's Scholarship (all semesters), Dean's Honor List (Fall 2018, Spring 2019)
- Journal: PEPPERDINE LAW REVIEW (Associate Editor 2020 – 2021, Staff Member 2019 – 2020)
- Advocacy: Moriarty Moot Competition, Quarterfinalist (Spring 2019)
- Activities: Advocates for Public Interest Law (President), Christian Legal Society (Co-Chair), Honor Board (Co-Chair), LexisNexis (Associate), Student Mentor Board (Vice President)

University of Northwestern – St. Paul — St. Paul, MN
Bachelor of Arts, Education Studies — August 2016

- GPA: 3.82, *Magna Cum Laude*
- Honors: Dean's List, Pi Lambda Theta Education Honor Society, Certificate in Leadership Development
- Study Abroad: Seville, Spain and Beijing, China

PROFESSIONAL EXPERIENCE

Fitzpatrick & Hunt, Pagano, Aubert LLP — Los Angeles, CA
Summer Associate — June 2020 – July 2020

- Analyzed case law and statutes to determine an appropriate worker's compensation settlement.
- Researched bankruptcy procedures and federal regulations to recoup legal fees.
- Compiled case law and statutes applying the political question doctrine to aviation litigation.

Coast Guard JAG Headquarters — Washington, DC
Legal Intern — January 2020 – May 2020

- Updated boarding operations and maritime law enforcement manuals to reflect current statutes and case law.
- Analyzed the competing claims of South American countries in mineral-rich maritime zones.
- Determined the jurisdictional authority of the Coast Guard, Navy, and NOAA over a shipwrecked vessel.

Navy JAG Corps Regional Legal Service Office SE — New Orleans, LA
Legal Intern — May 2019 – July 2019

- Investigated sailor misconduct and made non-judicial punishment recommendations.
- Drafted updated legal policy guides for military base housing contractors.
- Briefed senior officials on the legal sufficiency of Equal Employment Opportunity violation allegations on base.

Minnesota State Senate — St. Paul, MN
Committee Legislative Assistant — January 2018 – August 2018

SkyWest Airlines — Chicago, IL
Flight Attendant — January 2017 – December 2017

ADDITIONAL INFORMATION

- Foreign Languages: Fluent in Spanish
- Community Service: Animal Care League Volunteer, Sunday School Teacher
- Interests: Exploring new cities, themed party planning, competitive running

Alexandra Boutelle
Pepperdine University School of Law
Cumulative GPA: 3.657

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Constitutional Structure		A	2.00	
Introduction to Professional Formation		N/A	0.00	Required Ungraded Course
Law Exam Workshop		N/A	0.00	Required Ungraded Course
Legal Research I		B	2.00	Experiential Course
Property		A	5.00	
Torts		A	5.00	

Dean's List

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure		A		
Contracts		A		
Criminal Law		B+		
Legal Research II		B+		Experiential Course

Dean's List

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Trial Preparation & Settlement		P	1.00	Pass. ABA Experiential Course.
Criminal Procedure		B-	3.00	
Evidence		B+	3.00	
Family Law		B+	2.00	
Investigations Law		P	2.00	Pass.
Law Review		P	2.00	Pass. Course Satisfies Writing Intensive Requirement.
White Collar Crime		P	2.00	Pass.

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Advanced Legal Writing		S	2.00	Satisfactory. Course Satisfies a Writing Intensive Requirement.
Externship		S	10.0	Satisfactory. ABA Experiential Course.
Law Review		S	2.00	Satisfactory. Experiential Course.

Lawyering in the Nation's Capital	S	2.00	Satisfactory.

Due to the coronavirus pandemic, this semester was graded Satisfactory/Unsatisfactory/Fail, with Unsatisfactory being the equivalent of a D grade in other semesters. There was no Dean's List created.

Grading System Description

The grading system at Pepperdine is a traditional curved letter grade system except for the Spring 2020 semester, which was changed to a Satisfactory/Unsatisfactory/Fail system due to the coronavirus pandemic.

Alexandra Boutelle
University of Northwestern - St. Paul
Cumulative GPA: 3.829

Fall 2012

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Concepts of Astronomy		D	4.0	
Concepts of Astronomy Lab		S	0.0	Satisfactory.
Lifetime Fitness & Wellness		A	4.0	
Public Speaking		C-	3.0	

I entered college with 30 credits from Post-Secondary Enrollment courses (classes listed in Fall 2011 and Spring 2012), AP exams, and a CLEP exam. I also tested out of one course and took a pass-fail course outside the university.

Spring 2012

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
History of Western Civilization		A	4.0	
Introduction to Music		A	2.0	

Fall 2012

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Biblical Worldview Personal Responsibility		A	2.0	
Critical Thinking & Writing		A-	2.0	
Intermediate Spanish I		A	4.0	
Lifespan Psychology		A	4.0	
Math for Elementary School Teachers		A	4.0	
Principles of Art		A	2.0	

Spring 2013

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Content Area Reading		A	2.0	
Educational Foundations		A	2.0	
Educational Foundations Lab		S	0.0	Satisfactory.
Intermediate Spanish II		A	4.0	
Introduction to Linguistics		A	4.0	
Theory of Second Language Acquisition		A	4.0	

Fall 2013

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Human Relations Lab		S	0.0	Satisfactory.

Human Relations in a Cross-Cultural Diverse World	A	4.0	
Instructional Foundations Grades K-12	A	3.0	
Instructional Technology I	A	1.0	
Language School and Society	A	4.0	
School Health and Drug Problems	A	2.0	
Spanish Grammar	A	4.0	
Workshop in Leadership Development	S	0.0	Satisfactory.

Spring 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Educational Psychology		A	2.0	
Elementary Methods Lab I		S	0.0	Satisfactory.
Elementary Methods Seminar I		S	0.0	Satisfactory.
Kindergarten Lab		S	0.0	Satisfactory
Kindergarten Methods & Primary Learner		A	2.0	
Math Methods Elementary Teachers K-6		A	3.0	
Physical Education/Health Methods for Elementary Teachers K-6		A-	3.0	
Science Methods for Elementary School Teachers K-6		A	3.0	
Social Studies Methods for Elementary Teachers K-6		A	2.0	
Spanish Through Service		P	2.0	Pass.
Topics in International Education - China		A	1.0	
Workshop in Leadership Development		S	0.0	Satisfactory.

Summer 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
New Testament History and Literature		B+	2.0	
Principles of Biblical Interpretation		A	2.0	
Topics: China Study Abroad		S	0.0	Satisfactory.

Fall 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Service Learning		A	2.0	
Spanish Advanced Communication		A-	4.0	
Spanish American Literature II		A	4.0	
Spanish Literature I		A	4.0	
Three Cultures of Spain		A	4.0	

These courses were taken entirely in Spanish in Seville, Spain.

Spring 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Art Methods for Elementary School Teachers		A	2.0	
Children's Literature		A	2.0	
Elementary Methods Lab II		S	0.0	Satisfactory
Elementary Methods Seminar II		S	0.0	Satisfactory.
Language Arts Content Teaching Strategies		A	4.0	
Latin American Short Stories		A	4.0	
Music Methods for Elementary School Teachers K-6		A	2.0	
Reading Methods & Strategies for Elementary School Teachers K-6		A	4.0	
Workshop in Leadership Development		S	0.0	Satisfactory.

Summer 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Daniel		W	0.0	Withdrawn.
Systematic Theology		W	0.0	Withdrawn.

I withdrew from these courses due to illness.

Fall 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Methods Lab- Spanish Elementary		S	0.0	Satisfactory.
Methods Lab- Spanish Secondary		S	0.0	Satisfactory.
Methods and Materials for Language Teaching		A	4.0	

Spring 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS

Christian Thought	A	4.0
Education Ethics	B+	2.0
Historical Theology	A	4.0
Instructional Technology II	A	1.0
Spanish Conversation & Composition	A	4.0

Summer 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Daniel		A	2.0	
Educating Diverse Learners K-12		A	2.0	

Grading System Description
The grading system at the University of Northwestern - St. Paul (formerly Northwestern College) is a traditional letter grade scale with a total possible grade point average of 4.0.

September 03, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

It is my great honor to recommend to you Alexandra Boutelle for a judicial clerkship position with your chambers. Alex is among our top incoming third-year students at Pepperdine's Caruso School of Law. She is an outstanding candidate for a clerkship, not only because of her stellar academic record, but because she is exceptionally bright, hard-working, engaged, and mature. In my Property course, she earned a final grade of A, as she did in four other first-year courses. Alex was always prepared, attentive, and studious in class. Her questions about the material were astute and based on our interactions in and out of the classroom, I am confident that she will be highly successful in her remaining time at Caruso School of Law and in her future career.

Alex's professional and volunteer experiences are impressive. During the summer following her first year, she worked as a legal intern for the Navy JAG Corps in New Orleans where she investigated sailor misconduct and drafted legal policy guides for military base housing contractors. Alex also served as an intern for the Coast Guard JAG Corps in Washington, D.C. in the spring of 2020. She has volunteered with the Animal Care League and served as a Sunday school teacher. Her current involvement in extra-curricular activities at the law school is extraordinary. It is rare to see a student participate in moot court, law review, and the Honor Board, while also leading two student organizations. Alex is a dynamic and dedicated student and person.

The focus and energy Alex brings to her work is admirable. She also has the demeanor and teamwork mentality to work in challenging and stressful environments. Alex's academic success, along with her consistently cheerful, energetic, caring, enthusiastic, and motivated personality will be an asset to your chambers. I sincerely urge you to review her academic record and background and give her the opportunity to impress you with her capabilities as much as she has impressed me. While I know that you will have many wonderful applicants, I am confident that Alexandra Boutelle will be a tremendous asset, should you have the good fortune to hire her.

Sincerely,

Shelley Ross Saxer
Laure Sudreau Chair in Law

Shelley Saxer - shelley.saxer@pepperdine.edu - 310-506-4657

September 03, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

This is a letter of recommendation for Alexandra Boutelle whom I highly recommend. Ms. Boutelle is an exceptional person, dedicated to honor and excellence, and I know that she will make an outstanding judicial clerk.

I have known Ms. Boutelle since she started Law School. During her first year, Ms. Boutelle was a student in my Civil Procedure class. She was always prepared. I knew I could call on her in a class of over seventy students to help lead the discussion. Her legal analysis and writing is top notch which is clearly reflected by her superb grades.

Ms. Boutelle cares deeply about service and justice which is why I intentionally reached out to her to ask her to be a Chair of the Law School Honor Board. I knew that her commitment to fairness and justice would make her an ideal leader. And, I was right. Under Ms. Boutelle's leadership, the Honor Board has engaged in education programs and upheld the highest of standards. Because of her successful leadership, I asked her once again to lead as a student representative on the University-wide Strategic Planning Committee where her vision and ideas will help shape the future goals of the entire University.

Simply put, Ms. Boutelle is dedicated to excellence and has a sharp legal mind. She also brings quiet maturity to all she does. Ms. Boutelle will be a wonderful addition to chambers. I give her my highest of recommendations.

Sincerely,

Naomi Goodno
Dean of Students and Professor of Law
naomi.goodno@pepperdine.edu
310-497-2928
naomi.goodno@pepperdine.edu

September 03, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

It is my honor to recommend Alexandra Boutelle for a clerkship in your chambers. I had the pleasure of supervising Alex's externship and having her in class this past spring, while she participated in Pepperdine Law's Washington, D.C., Externship Semester. In this demanding program, Alex excelled in her full-time externship at the Coast Guard JAG Headquarters, while completing coursework at night.

Alex is a sharp and engaged student who loves the law. She eagerly seeks opportunities to sharpen her writing, her legal reasoning, and her knowledge of the law, and the fruits of those efforts were evident in all aspects of her performance in the Washington Semester. Her placement supervisor at the Coast Guard rated her work in her externship as "outstanding," which was consistent with her performance in the Washington courses. Specifically, whether discussing critical legal questions that go to the heart of our system of government in Lawyering in the Nation's Capital, peer-editing in Advanced Legal Writing, or offering solutions to practical issues arising in students' externships in the Washington Workshop, Alex added significant value through respectful critique and insightful comments. Alex was always well prepared for class and contributed meaningfully to class discussion, exuding eagerness to learn new and challenging material. Her comments in class were always well-articulated and thoughtful, the obvious result of study and deliberation over reading materials.

A driven and motivated law student, Alex is also unfailingly humble and kind. She listens in earnest and thoughtfully considers arguments and viewpoints contrary to her own. Her kind nature and respect for her peers, even in the face of disagreement, greatly impacted the tenor of our classes. I am confident that she would be capable clerk who would be an asset to—and a joy to have in—your chambers. It is my pleasure to give Alex my highest recommendation.

Sincerely,

Nancy Hunt
Director, Washington, D.C., Externship Semester
Assistant Professor of Law and Practice

Nancy Hunt - Nancy.hunt@Pepperdine.edu - 703-4004827

ALEXANDRA BOUTELLE

16231 Excelsior Drive • Rosemount, MN 55068
(507) 358-6631 • alexandra.boutelle@pepperdine.edu

Writing Sample

The attached issue paper is a legal analysis of Coast Guard law enforcement officers' authority to enforce state law during a Stafford Act emergency. The paper was written as a guide to the limitations and liability risks associated with land-based operations during emergencies such as the 2020 coronavirus pandemic. I drafted the paper during my externship with the Maritime and International Law Division of Coast Guard JAG. My supervisor granted permission for the document to be used as a writing sample.

JUDGE ADVOCATE GENERAL
ISSUE PAPER
03 MAY 2020

A Coast Guard Attorney prepared this document for INTERNAL FEDERAL EXECUTIVE BRANCH USE ONLY. This document is pre-decisional in nature and qualifies as an inter-agency/intra-agency document containing deliberative process material. This document contains confidential attorney-client communications relating to a legal matter for which the client has sought professional advice. Under exemption 5 of section (b) of 5 U.S.C. § 552 (Freedom of Information Act), this material is EXEMPT FROM RELEASE TO THE PUBLIC.

Subject: AUTHORITY OF COAST GUARD LAW ENFORCEMENT OFFICERS TO ASSIST STATE AND LOCAL AGENCIES UNDER EMERGENCY SUPPORT FUNCTION (ESF) #13

Executive Summary: After a presidential declaration of emergency under the Stafford Act, USCG servicemembers may be deployed to offer direct federal assistance (DFA) to state and local authorities. During Stafford emergencies, FEMA may issue mission assignments (MAs) under ESF 13, directing federal law enforcement officers (FLEOs) to enforce state and local laws. Such deputation of FLEOs must be explicitly authorized by executive or statutory authority and must be related to the purpose of the deployment. Strict adherence to the below regulations and statutes will avoid potential civil and criminal liability for individual servicemembers and for the Coast Guard as a whole.

Discussion:

Purpose of the Stafford Act

The Stafford Act was designed for the federal government to "supplement the efforts at the state and local level following a national disaster [or emergency] at the request of the state."[1] Under the Act, governors of affected states may request an emergency declaration[2] or the President may independently make such a declaration.[3] A Stafford Act emergency enables the President or his designee to direct and coordinate federal agencies' provision of tangible equipment, supplies, and facilities, as well as personnel and advisory services, such as safety and public health information.[4] In addition to these specific forms of aid, the President may authorize additional federal assistance "where necessary to save lives, prevent human suffering, or mitigate severe damage."[5]

The National Response Framework and Emergency Support Function 13

The National Response Framework (NRF) delineates federal agencies' roles and limitations when assisting state and local authorities during large-scale incidents, disasters, and emergencies.[6] Within the NRF, Emergency

[1] Mark Nevitt, *The Coronavirus, Emergency Powers, and the Military: What You Need to Know*, JUST SECURITY (Mar. 16, 2020), https://www.justsecurity.org/69215/the-coronavirus-emergency-powers-and-the-military-what-you-need-to-know/.

[2] In order to make this request, governors must first find the situation "requires supplementary Federal emergency assistance to save lives and to protect property, public health and safety, or to lessen or avert the threat of a disaster." 44 C.F.R. § 206.35(b)(2).

[3] The President may independently declare a national emergency "when he determines that an emergency exists for which the primary responsibility for response rests with the United States because the emergency involves a subject area for which, under the Constitution or laws of the United States, the United States exercises exclusive or preeminent responsibility and authority." 42 U.S.C. § 5191(b).

[4] 42 U.S.C. § 5192. Federal emergency assistance.

[5] 42 U.S.C. § 5192(a)(3)(E)(8). Federal emergency assistance specified.

[6] *National Response Framework*, DEPARTMENT OF HOMELAND SECURITY (4th ed. Oct. 28, 2019), accessible at https://www.fema.gov/media-library-data/1582825590194-2f000855d442fc3c9f18547d1468990d/NRF_FINALApproved_508_2011028v1040.pdf.

Support Function (ESF) 13 describes preparations for public safety and security in emergencies.[7] Under ESF 13, FEMA can issue Direct Federal Assistance (DFA)[8] Mission Assignments (MAs)[9] to federal agencies such as the Coast Guard, directing them to support state and local authorities by performing specific tasks such as crowd control, protecting critical infrastructure, and coordinating the law enforcement response to the emergency.[10]

Direct Federal Assistance Mission Assignments

MAs can only be issued by FEMA after an Emergency/Major Disaster Declaration, a State or local request for federal assistance, and a signed FEMA-State Agreement or FEMA-Tribal Agreement.[11] According to 44 C.F.R. § 206.44(c), FEMA issues MAs in writing[12] to other federal agencies such as the Coast Guard, although such writing may also serve as the confirmation of a verbal request. In limited urgent circumstances, a FEMA official with Disaster Recovery Manager authority may issue a verbal response MA.[13] The written MA must contain a Statement of Work that specifically describes the required task to be completed, allows the federal agency flexibility to accomplish the task, and estimates the reimbursable costs of the work.[14] Depending on funding, oversight, and assistance provided, the original MA may be amended or a new MA may be issued.[15] Within an approved MA, a Mission Assignment Task Order may direct a federal agency to complete a specific

[7] *National Response Framework: Emergency Support Function #13 – Public Safety and Security Annex* [hereinafter ESF 13], DEPARTMENT OF HOMELAND SECURITY (June 2016), accessible at https://www.fema.gov/media-library-data/1470149136419-d6dc70a586f4b0bc8f0c689008974f44/ESF_13_Public_Safety_and_Security_20160705_508.pdf.

[8] 44 C.F.R. § 206.208. Direct federal assistance; *FEMA Mission Assignments* [hereinafter FEMA MAs], FEMA 360 PUBLIC ASSISTANCE PROGRAM (July 4, 2019), https://www.fema360.com/article/fema-mission-assignments; *Mission Assignment Policy FP 104-010-2* at 5, FEMA OFFICE OF RESPONSE AND RECOVERY (Nov. 6, 2015), https://www.fema.gov/media-library-data/1450099364660-fd855ba68f3189d974966ea259a2641a/Mission_Assignment_Policy.pdf.

[9] "Mission Assignment (MA): A work order issued by FEMA, with or without reimbursement, that directs another Federal agency to utilize its authorities and the resources granted to it under Federal law in support of State, local, tribal, and territorial government assistance (42 U.S.C. §§ 5170a, 5192; 44 C.F.R. § 206.2(a)(18))." *FEMA MAs*, *supra* note 8.

[10] All work "must be eligible under the Stafford Act and Federal regulations" and is "subject to the cost-sharing provisions applicable to the disaster." *Direct Federal Assistance*, FEMA 360 PUBLIC ASSISTANCE PROGRAM (Jun. 29, 2019), https://www.fema360.com/article/direct-federal-assistance.

[11] Note that there are two types of MAs – Federal Operational Support (FOS, federal to federal assistance, 100% federally funded) and Direct Federal Assistance (DFA, federal to state/local assistance, federal cost 75% or more). *FEMA Mission Assignments*, *supra* note 9; FEMA OFFICE OF RESPONSE AND RECOVERY, *supra* note 8 at 5.

[12] *See, e.g.*, *FEMA Form 010-0-8: Mission Assignment (MA),* DEPARTMENT OF HOMELAND SECURITY FEDERAL EMERGENCY MANAGEMENT AGENCY (last accessed Apr. 14, 2020), https://www.fema.gov/media-library-data/1400690407172-6fb5cb5640648e3f12b0ddf80ccd6302/FEMA_Form_010-0-8.pdf.

[13] A DRM exercises the authority of a Regional Administrator (RA) during a disaster and can further delegate this authority to Federal Coordinating Officers (FCOs), Federal Disaster Recovery Coordinators (FDRCs), the Chief of the National Response Coordination Staff (NRCS), and the NRCS Resource Support Section Chief. FEMA OFFICE OF RESPONSE AND RECOVERY, *supra* note 8 at 6.

[14] *Id.* at 6 – 7 (In order to speed the processing of MAs, FEMA and OFAs may prepare and agree to SOWs in advance of an emergency through Pre-Scripted Mission Assignments (PSMAs), although the PMSA must be tailored to the specific emergency and the final MA must be approved prior to issuance and may be bundled with other similar PMSAs for the same OFA).

[15] *See Id.* at 7 (describing the circumstances requiring an MA amendment or the issuance of a new MA).

task, preventing FEMA from issuing multiple similar MAs or further directing action under an existing statement of work.[16]

Federal Law Enforcement Officers

Generally, DFA MAs under ESF #13 consist of missions requiring FLEOs to be deputized and arrest violators of state law.[17] Federal law describes military FLEOs as physically fit employees whose duties "are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States, or the protection of officials of the United States against threats to personal safety."[18] Thus, within the Coast Guard, any military justice billets requiring fit servicemembers to perform law enforcement functions would qualify the servicemember in that position as a FLEO. There are, however, restrictions to USCG FLEOs' ability to enforce state laws.[19] According to 14 U.S.C. § 522, the Coast Guard has federal law enforcement authority on U.S. waters.[20] Any land-based law enforcement action must therefore be explicitly authorized by statute or executive action. USCG FLEOs can accept state deputation and arrest violators of state law if two conditions are met: federal or state law expressly grants arresting authority and any funding of FLEOs' work must be used for the reason for which the funding was appropriated.[21]

---

[16] A MATO "must be reviewed for potential changes in funding or extension of the period of performance in order to ensure appropriate amendments are processed in a timely manner." *Id.* at 7 – 8.

[17] *ESF 13*, *supra* note 7; State and Local Deputation of Federal Law Enforcement Officers During Stafford Act Deployments, 35 Op. O.L.C. 1, 1 (2012).

[18] With regard to the military, a FLEO is an individual "in the field service at Army or Navy disciplinary barracks or at any other confinement and rehabilitation facility operated by any of the armed forces; whose duties in connection with individuals in detention suspected or convicted of offenses against the criminal laws of the United States or of the District of Columbia or offenses against the punitive articles of the Uniform Code of Military Justice (chapter 47 of title 10 [10 USCS §§ 801 et. seq.]) require frequent direct contact with these individuals in their detention and are sufficiently rigorous that employment opportunities should be limited to young and physically vigorous individuals, as determined by the head of the employing agency." 5 U.S.C. § 8401 (17).

[19] Specifically, federal involvement in law enforcement efforts at the state and local level must be carefully weighed in order to avoid violations of the Posse Comitatus Act (PCA), which generally prevents federal officers from enforcing state law. 18 U.S.C. § 1385. Use of Army and Air Force as posse comitatus. (Note: This Act was later interpreted to include the Navy and Marines in addition to the Army and Air Force.)
When deployed under state authority, the PCA does not apply to the National Guard. Joshua M. Samek, *The Federal Response to Hurricane Katrina: A Case for Repeal of the Posse Comitatus Act or a Case for Learning the Law?*, 61 U. MIAMI L. REV. 441, 454 (2007) ("Although the Posse Comitatus Act itself applies only to the Army and Air Force, its substantive prohibitions have been extended to both the Navy and the Marines by statute and DoD regulation. The United States Coast Guard is exempt from the restrictions of the Posse Comitatus Act because the Coast Guard is statutorily authorized to perform law enforcement functions. While the Act does not specifically address whether its restrictions apply to the National Guard, 'there seems every reason to consider the National Guard part of the Army or Air Force, for the purposes of the . . . Act, when in federal service.' The Posse Comitatus Act, however, does not apply to members of the National Guard when they are in state service, leaving them free to conduct law enforcement activities.").
Although the PCA prohibition on domestic action does not apply to USCG, it is important to analyze DoD restrictions because USCG servicemembers are frequently deployed in conjunction with sister military services and the National Guard during Stafford emergencies. In those situations, USCG awareness of fellow servicemembers' authority can strengthen the efficiency and efficacy of the overall federal emergency response.

[20] This authority is further defined by 14 U.S.C. § 523, which describes the law enforcement power held by all USCG servicemembers, and by 14 U.S.C. § 525, which grants Coast Guard Investigative Service (CGIS) special agents the authority to carry weapons, execute and serve warrants, and make warrantless arrests for offenses the special agent witnesses or has probable cause to believe occurred.

[21] Arrests made by FLEOs must "bear a 'logical relationship to the objectives' of the Stafford Act." 35 Op. O.L.C. at 2.

Absent statutory authority, FLEOs may still exercise state law enforcement powers under executive authority, such as a governor's order, as long as the DOJ grants a concurrence.[22] Once such power is granted to USCG law enforcement, however, servicemembers may only exercise the authority when they have been properly deployed under federal law; and when the arrest would advance the purposes of the federally-authorized deployment."[23] In addition to arrests, FLEOs may perform a wide range of law enforcement functions such as protecting emergency responders and critical infrastructure as well as coordinating mission assignments to other federal entities, non-government organizations (NGOs), and private organizations.[24]

Liability Risk to USCG

When the Coast Guard offers DFA to state and local authorities under ESF 13, there are several areas of potential liability because deployed FLEOs are performing functions outside of normal USCG operations. Although USCG boarding teams and security officers regularly search vessels, seize evidence, and arrest violators, this authority is confined to operations on U.S. navigable waters and Coast Guard bases.[25] When FLEOs' authority is extended to land enforcement during a Stafford Act emergency, deputed officers must enforce state and local laws outside of their training expertise. This lack of familiarity can risk civilians' physical safety and constitutional rights because officers are accustomed to detaining foreign and military suspects in situations where the Fourth, Fifth, and Sixth Amendments do not apply as they do to U.S. citizens on land. FLEOs whose conduct violates civilians' constitutional rights or results in physical harm face both civil and criminal liability.

In addition to Constitutional requirements, arrests must also "bear a logical relationship" to the reason for the deployment under the Purpose Act.[26] For example, if a FLEO arrests a civilian for a state law violation such as a speeding violation, yet the arrest is unrelated to the purpose of a disaster relief deployment, the FLEO is liable for his or her violation of the Purpose Act. Under the doctrine of respondeat superior, which imputes liability to supervisors for the actions of their employees, commanding officers of FLEOs risk liability as well if officers were acting within the scope of their law enforcement duties when they violated citizens' constitutional rights or the Purpose Act.[27]

---

[22] *ESF 13*, *supra* note 7.

[23] 35 Op. O.L.C. at 7.

[24] The following are FLEO tasks delineated under the ESF #13 core capability of On-Scene Security, Protection, and Law Enforcement: "Provides general and specialized Federal law enforcement resources to support local, state, tribal, territorial, insular area, and Federal law enforcement departments and agencies overwhelmed by disasters or acts of terrorism. ESF #13 FLEOs can perform a wide array of missions as defined through the DHS/FEMA mission assignment process. Protects critical infrastructure during prevention activities or disaster response, when requested. Protects emergency responders. Determines the role, if any, of private sector/NGOs in the overall public safety and security response. Assists state law enforcement and government officials in determining the methodology by which FLEOs will be granted state law enforcement authority during ESF #13 responses. Manages the development of pre-scripted mission assignments to address known and anticipated disaster response public safety and security short falls. Gives priority to life safety missions first, followed by missions that address security and the protection of infrastructure/property. Considers the availability of safety and security resources within the requesting Federal department or agency when providing ESF #13 support to other Federal ESFs." *ESF 13*, *supra* note 7.

[25] 14 U.S.C. § 522. Law enforcement.

[26] See *supra* note 21 and accompanying text.

[27] Stephen Michael Sheppard, *Respondeat Superior*, *in* Bouvier Law Dictionary (Wolters Kluwer Law & Business 2012).

Along with individual liability, USCG could face corporate civil and criminal liability during Stafford Act deployments. If units assist state and local authorities without explicit authorization for land-based operations or without statutory deputation under state law, such action violates DFA regulations according to ESF 13.[28] Like Constitutional and Purpose Act violations, superior USCG officers could face liability for individual FLEOs' actions that do not adhere to ESF 13 guidelines because of respondeat superior.[29] Finally, USCG could be liable for violations of the Posse Comitatus Act if it is deployed while serving as a branch of the Navy rather than as a separate service.[30]

Individual servicemembers and USCG can avoid criminal and civil liability through strict adherence to statutory requirements for DFA under ESF 13 during Stafford Act Emergencies. Careful protection of civilians' safety and Fourth, Fifth, and Sixth Amendment rights is imperative to the preservation of individual USCG servicemembers' and corporate USCG reputation and efficacy. Commanding officers must give clear orders and ensure subordinates understand the limitations of state law enforcement so that they are not liable for Purpose Act or other statute violations under respondeat superior. USCG authorities also need to verify they have appropriate statutory authorization for enforcing state law and that they are not in violation of the Posse Comitatus Act if they are deployed under Navy authority.

Conclusion: Thus, in their analysis of USCG authority to enforce state laws, operational commanders must carefully consider the state and local needs for which the deployment was initiated, the executive and statutory authority deputing FLEOs, and the relationship of specific state law violations to the mission of the deployment. Strict adherence to the deployment's purpose and guiding authorities will reduce the risk of civil and criminal liability, both for individual servicemembers and USCG as a whole.

[28] See *supra* notes 20 – 21 and accompanying text.

[29] Sheppard, *supra* note 27.

[30] See *supra* note 19.

Applicant Details

First Name	**Kevin**
Last Name	**Breiner**
Citizenship Status	**U. S. Citizen**
Email Address	**krb3tx@virginia.edu**
Address	**Address** Street **101 Ivy Dr. Apt. 11** City **Charlottesville** State/Territory **Virginia** Zip **22903** Country **United States**
Contact Phone Number	**7574931739**

Applicant Education

BA/BS From	**Virginia Commonwealth University**
Date of BA/BS	**May 2018**
JD/LLB From	**University of Virginia School of Law** **http://www.law.virginia.edu**
Date of JD/LLB	**May 24, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Virginia Environmental Law Journal**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Lile**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships **No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Cannon, Jonathan
jcannon@law.virginia.edu
(434) 924-3819
Kevin, Cope
kcope@law.virginia.edu
(434) 924-4492

References

Professor Jon Cannon, 434-924-3819, jzc8j@virginia.edu

Professor Kevin Cope, 202-215-4796, kcope@law.virginia.edu

Professor Anthony Russell, 540-492-5300,
arussell@michiehamlett.com

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Kevin Breiner
101 Ivy Dr., Apt. 11
Charlottesville, Virginia 22903
Krb3tx@virginia.edu | (757) 493-1739

June 14, 2021

The Honorable Elizabeth W. Hanes
U.S. District Court, E.D. Va.
701 East Broad St.
Richmond, Virginia 23219

Dear Judge Hanes:

I am a rising third-year student at the University of Virginia School of Law, and I am writing to apply for a clerkship in your chambers following my graduation in May 2022. I was born and raised in Virginia, and I hope to practice in the area.

I am enclosing my resume, writing sample, law school transcript, and list of references. You will also be receiving letters of recommendation from Professor Cannon (434-924-3819) and Professor Cope (202-215-4796).

Please let me know if I can provide any further information. Thank you for your time and consideration.

Sincerely,

Kevin Breiner

Kevin Breiner

101 Ivy Drive, Apt. 11 | Charlottesville, VA | krb3tx@virginia.edu | (757)493-1739

EDUCATION

University of Virginia School of Law, Charlottesville, VA
J.D., Expected May 2022, G.P.A. 3.68

- Dean's Scholarship
- Law and Public Service, Fellow
- Virginia Environmental Law Journal, Production Editor (2020) and Executive Editor (2021)
- William Minor Lile Moot Court Competition, Participant
- Virginia Environmental Law Forum, Member
- 80 pro bono hours with the Legal Aid Society of Eastern Virginia and US Green Building Council

Frank Batten School of Leadership and Public Policy, University of Virginia, Charlottesville, VA
M.P.P., Expected May 2022, G.P.A. 3.9

- Virginia Policy Review, Associate Editor (2018-19) and Staff Writer (2021)
- Published op-ed on policy implementation with the Harvard Kennedy School Review

Virginia Commonwealth University, Richmond, VA
B.A., Political Science (Minors: Environmental Studies & Music), *summa cum laude,* May 2018

- Provost Scholarship, full scholarship for distinguished freshman applicants
- Published a paper on presidential authority in the VCU Political Science Review; presented at VCU Student Research Conference
- Best Political Theory Essay, Pi Sigma Alpha Essay Contest
- Symphonic Wind Ensemble, Clarinet Player

EXPERIENCE

Earth Rights International, Washington, D.C.
Intern, May – July 2021

Our Children's Trust, Eugene, OR
Law Clerk, May – July 2020

- Conducted legal research to support state, federal, and international climate change litigation

University of Virginia Equity and Environment Fund, Charlottesville, VA
Student Chair, September 2019 – Present

- Review community-based projects to help determine their eligibility for university funding

University of Virginia School of Law Human Rights Program, Charlottesville, VA
Research Assistant, June – August 2019

- Conducted research and coded data relating to human rights treaties and judicial ideology

Friends Association, Richmond, VA
Volunteer, May 2017 – May 2018

- Taught weekly clarinet lessons to several elementary and high school students

Youth Life Foundation, Richmond, VA
Teaching Intern, June – August 2017

- Taught math and language arts to elementary students on a daily basis

Virginia House of Delegates, Richmond, VA
Intern, January – March 2017

- Communicated with constituents and conducted research on behalf of a House Delegate

UNIVERSITY OF VIRGINIA
SCHOOL OF LAW

Name: Kevin Breiner

Date: June 10, 2021
Record ID: krb3tx

This is a report of law and selected non-law course work (including credits earned). This is not an official transcript.

Due to the global COVID-19 pandemic, the Law faculty imposed mandatory Credit/No Credit grading for all graded classes completed after March 18 in the spring 2020 term.

		FALL 2019			
LAW	6000	Civil Procedure	4	A	Harrison,John C
LAW	6002	Contracts	4	B+	Mahoney,Paul G
LAW	6003	Criminal Law	3	A-	Coughlin,Anne M
LAW	6004	Legal Research and Writing I	1	S	Fore Jr.,Joe
LAW	6007	Torts	4	A-	Strauss,Gregg
		SPRING 2020			
LAW	6001	Constitutional Law	4	CR	Nachbar,Thomas B
LAW	7088	Law and Public Service	3	CR	Shin,Crystal Sue
LAW	6005	Lgl Research & Writing II (YR)	2	S	Fore Jr.,Joe
LAW	6006	Property	4	CR	Nicoletti,Cynthia Lisa
LAW	7091	Water Law and Policy	3	CR	Szeptycki,Leon
		FALL 2020			
LAW	6102	Administrative Law	4	A-	Duffy,John F
LAW	7060	Land Use Law	3	A-	Cannon,Jonathan Z
LAW	7071	Professional Responsibility	3	B+	Mitchell,Paul Gregory
LAW	7085	Social Science in Law	3	B+	Monahan,John T
		SPRING 2021			
LAW	9273	Climate Change Law & Policy	3	A	Cannon,Jonathan Z
LAW	6112	Environmental Law	3	A	Livermore,Michael A.
LAW	6105	Federal Courts	4	A-	Re,Richard Macdonald
LAW	9200	Federal Litigation Practice	3	A-	O'Keeffe,James
LAW	7810	Music Law (SC)	1	A	Pruett,Amy Gwynn Neumeister

June 11, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

This is enthusiastically to recommend Kevin Breiner for a clerkship in your chambers. Kevin is a gifted writer and thinker. He would make a wonderful judicial clerk.

I came to know Kevin as a student in two courses this last academic year – Land Use Law and Climate Change Law and Policy. In Land Use Law, a lecture course, Kevin was one of the outstanding contributors. His written questions on the readings – which I required of every student on a twice-weekly basis – were thoughtful and probing. His comments in class were insightful and helped move the discussion in useful directions; his exam was well-written and analytically precise.

Climate Change Law and Policy is a seminar, which requires students to write a short essay and a substantial research paper as well as weekly responses to the readings. Kevin earned an A in the course, but that grade by itself does not fully convey the caliber of his performance. In a class of seventeen talented students, the quality of Kevin's weekly responses and short essay placed him among a small handful of the top students. His research paper placed him at the very top: it was simply better than anyone else's and among the best I have seen in my twenty-three years of law teaching. As a matter of policy, I do not give A+s in seminars, but his paper would have merited it.

Focused on judicial review of climate change regulations under the Clean Air Act, the paper was elegant, thorough and persuasive in its analysis of recent Supreme Court cases bearing to the topic. The Clean Air Act is notoriously complex and textually challenging. Kevin unpacked the complexity without oversimplifying the statue and showed how recent Court decisions might guide future interpretations of the statute in the regulation of greenhouse gas emissions. He did all this without losing the reader in the thicket of close textual analysis and doctrinal niceties, a fate to which many writing in this area, including me, have sometimes succumbed. The fluency, composure and analytical skill evident in this paper leave no doubt that Kevin would make a superb judicial clerk.

Kevin has had comparable success in his other law school classes, betokened by his excellent 3.68 GPA. I note particularly his A this last semester in environmental law, taught by Professor Michael Livermore – a course that stresses both policy analysis and legal interpretation and is known for its difficulty.

In addition to his classroom work, Kevin is active on two student-led scholarly publications, serving as Executive Editor of the Virginia Environmental Law Journal and as a staff writer for the Virgina Policy Review, a publication of UVA's Batten School. He has logged eighty hours of pro bono work with the Legal Aid Society of Eastern Virginia and the U.S. Green Building Council. He also gained experience as a legal intern for Our Children's Trust last summer and as a research assistant for Professor Kevin Cope of the law school.

Kevin is confident in his work but modest in his dealings with others. His intellectual and personal qualities are the equal of other students of mine who have gone on to successful clerkships on state and federal courts. With his attractions to public interest law and legal writing, Kevin would benefit immensely from a clerkship with you and would have much to contribute. I recommend him without reservation and urge your favorable consideration of his application.

Sincerely,

/s/

Jonathan Z. Cannon
Blaine T. Phillips Distinguished Professor of Law
University of Virginia School of Law
580 Massie Road
Charlottesville, Virginia 22903
Phone: 434-924-3819
Fax: 434-982-2845
Email: jcannon@law.virginia.edu

Jonathan Cannon - jcannon@law.virginia.edu - (434) 924-3819

June 11, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I was pleased when Kevin Breiner asked me to write this letter supporting his clerkship application. I've known Kevin since summer 2019 and have closely observed his written and oral legal analysis skills. Based on these interactions, I know that Kevin will make an outstanding law clerk.

I hired Kevin as a student researcher before his first year of law school, because he was participating in a joint JD/MPP program here at UVA. Given his impressive undergraduate credentials, interview performance, and enthusiasm, I invited him to work with me for the summer. That turned out to be a good decision. Even though he had no formal legal training at that time, I challenged him by asking to do legal research on several different topics. He picked these things up quickly. He proved diligent, careful, and a great asset to the projects.
One of his main tasks was to work on a multi-year research program examining treaty negotiation documents to determine the origins and influences of the major United Nations human rights conventions. The research involved diligently examining and analyzing international archival documents and making difficult decisions about the relative influence, preferences, and policies of contributors to the international human rights regime. Performing this research requires a sophisticated understanding of both how international negotiations work and the substance of the treaties in question. Kevin was both genuinely interested in these questions and self-driven to succeed. In his work, he was meticulous and efficient.

In addition to his scholastic qualities, one of the most impressive aspects of Kevin is his commitment to public service, especially to environmental law. Kevin is passionate about serving the public interest as an environmental attorney. He would bring a strong public-interest background to the clerkship, and I have no doubt that he will use this experience and the skills he gains as a law clerk to pursue a distinguished career as an environmental attorney.

I myself clerked for federal judges at both the trial and appellate levels, and I've seen the qualities that make for an excellent law clerk. Kevin has all of those traits, and I am pleased to recommend him wholeheartedly. I'd be happy to speak with you further about Kevin if it would be helpful.

Sincerely,

Kevin L. Cope
Associate Professor of Law and Public Policy
Affiliated Faculty, Department of Politics

Cope Kevin - kcope@law.virginia.edu - (434) 924-4492

Writing Sample
Kevin Breiner

This is an excerpt from a moot court brief, in which I argued for the appellant (United States). For brevity, I have provided only the questions presented, a short statement of the case, and the argument.

QUESTIONS PRESENTED

The government appeals dismissal from the U.S. District Court for the District of Lile for consideration of the following questions:

(1) May a district court rule on a 12(b) motion to dismiss for improper venue, where a trial of the facts surrounding the commission of the alleged offense would assist in determining the motion?

(2) Does 18 U.S.C. § 3237, which prescribes venue for crimes "involving the use of . . . transportation in interstate or foreign commerce," govern a violation of 49 U.S.C. § 46504?

STATEMENT OF THE CASE

While onboard a plane flying near of border of states Minor and Lile, Defendant Meyer attacked a flight attendant, "scratching at his face and beating him about the head and neck." (R. 3).[1] Government evidence, put forth in the indictment, places the time of the alleged offense between 3:43 and 3:52 PM. (R. 3). For the majority of the time in this period (roughly six minutes), the plane was flying above Lile. (R. 3). The government therefore filed charges against Meyer in the U.S. District Court for the District of Lile for violating 49 U.S.C. § 46504, which imposes criminal sanctions on those "who, by assaulting . . . a flight crew member or flight attendant . . . [interfere] with the performance" of the victim's duties.

[1] For the purposes of this exercise, Minor and Lile are two fictional states within the continental United States.

Meyer moved to dismiss for improper venue under Fed. R. Crim. P. 12(b)(1), arguing that venue is appropriate only in the judicial district over which the plane was flying at the time of the alleged crime, and the government lacked sufficient evidence to prove the assault happened in Lile. (R. 4). The district court granted the motion. (R. 15-16).

The United States appeals, arguing that the district court did not have authority to rule on a pretrial motion to dismiss for improper venue, and venue in Lile is proper under 18 U.S.C. § 3237.

ARGUMENT

I. Judges may not rule on a 12(b)(1) motion if it implicates facts surrounding the commission of the alleged offense or requires weighing the sufficiency of the evidence pretrial.

First, "[a] party may raise by pretrial motion any defense, objection, or request, that the court can determine without a trial on the merits." Fed. R. Crim. P. 12(b)(1). A court may therefore hear a pretrial motion under 12(b)(1) only if "trial of the facts surrounding the commission of the alleged offense would be of *no assistance* in determining" the motion's validity. *United States v. Covington*, 395 U.S. 57, 60 (1969) (emphasis added). Second, the Federal Rules of Criminal Procedure do not allow a district court to dismiss a case pretrial for insufficient evidence. *United States v. Salman*, 378 F.3d 1266, 1268 n. 5 (11th Cir. 2004). The lower court thus erred in granting a pretrial motion to dismiss for improper venue based on insufficient evidence.

A. A court may not rule on a 12(b)(1) motion that implicates facts surrounding the commission of the alleged offense.

By ruling on a motion to dismiss for improper venue, on the ground that a "decision on venue is not relevant to the guilt or innocence of the defendant" (R. 6), the lower court misinterprets this command: A pretrial motion can only be decided "if trial of the facts

surrounding the commission of the alleged offense would be of no assistance in determining" its validity. *Covington*, 395 U.S. at 60. This rule plainly asks whether a trial of facts "surrounding" the offense would assist in determining the issues brought on a pretrial motion. *Id.* It does not concern itself with the opposite question: whether evidence implicated by the *motion* would assist in trying the defendant, i.e., determining her guilt or innocence. This distinction is of critical importance. Under the former approach, we must acknowledge that the location of an offense is a "surrounding" fact and that a trial on the merits would assist in its determination.

Appellee might respond that, even where there is a connection between surrounding facts and a pretrial issue, the issue may nonetheless be decided if its resolution does not require a trial. *United States v. Pope*, 613 F.3d 1255, 1260 (10th Cir. 2010). But this goes even further in distorting *Covington*'s plain language, by reading into the rule something that is simply not there. Issues are barred by *Covington* if a trial of surrounding facts would be of "*any assistance*" in determining those issues' validity. *Covington*, 395 U.S. at 60. This standard is wholly incompatible with the claim that judges may decide a 12(b) motion if a trial is not *required* to resolve it. *Pope*, 613 F.3d at 1260.

Furthermore, the contention that issues "inextricably intertwined with an *element* of the crime . . . cannot be resolved on a Rule 12(b) motion", *United States v. Sampson*, 898 F.3d 270, 285 (2d Cir. 2018) (emphasis added), does not mean that issues not so intertwined *can* be resolved on a 12(b) motion. Rather, cases in which the lower courts implicitly or explicitly ruled on certain elements of the offense at the pretrial stage are only particularly obvious violations of *Covington*. *Sampson*, 898 F.3d 270 (lower court implicitly deciding the *mens rea* elements of the offense); *United States v. Turner*, 842 F.3d 602 (8th Cir. 2016) (lower court deciding issues directly related to the criminal conduct). Indeed, it is always necessary to ask "what type of

factual finding" a given 12(b) motion requires, and whether a trial of the offense would assist in resolving it. *Turner*, 842 F.3d at 605. Here, while the time and place of the alleged offense are not specific *actus reus* elements, they are nonetheless unavoidably linked to the commission of the offense when it is viewed as a whole. It is difficult to imagine the trial of an offense where the parties do not seek to establish, or contest, that a crime occurred in some location or at some time. The question of venue, in other words, is "inevitably bound up with evidence about the alleged offense itself." *Id.* at 605.

Alternatively, the court should consider the view that venue *is* "an element of every offense," and thus is covered by *Sampson*.[2] *United States v. Perez*, 280 F.3d 318, 329 (3d Cir. 2002). Though the lower court is right that venue is subject only to a preponderance of the evidence standard, it nonetheless implicates "deep issues of public policy" regarding "the fair administration of criminal justice" embedded in the constitution. *United States v. Winship*, 724 F.2d 1116, 1124 (5th Cir. 1984). It is not written into every criminal statute, but it is still a fundamental part of each criminal case, and as such has been insulated from unilateral decision-making. *United States v. Johnson*, 956 F.3d 510 (8th Cir. 2020); *United States v. Haire*, 371 F.3d 833 (D.C. Cir. 2004). Any way you slice it, determinations of venue go to the core of any alleged crime.

B. Courts may not weigh the sufficiency of evidence on a Rule 12 motion to dismiss.

"[T]here is currently no authority within the Federal Rules of Criminal Procedure for granting a motion to dismiss predicated on the insufficiency of the evidence, whether it be based in fact or law." *Salman*, 378 F.3d at 1268 n. 5; *see also United States v. DeLaurentis*, 230 F.3d 659, 660 (3d Cir. 2000); *United State v. Jensen*, 93 F.3d 667, 669 (9th Cir. 1996); *United States*

[2] As mentioned earlier, *Sampson* holds that issues "inextricably intertwined with an element of the crime . . . cannot be resolved on a Rule 12(b) motion." 898 F.3d at 285.

v. Nabors, 45 F.3d 238, 240 (8th Cir. 1995). This rule follows from the lack summary judgment in criminal cases and precludes judges from deciding pretrial whether a "rational trier of fact could find for the non-moving party." *Sampson*, 898 F.3d at 280; *United States v. Yakou*, 428 F.3d 241, 246 (D.C. Cir. 2005) ("There is no federal criminal procedural mechanism that resembles a motion for summary judgment in the civil context"). It reflects a deliberate choice by the framers of the Rules to limit criminal discovery and prevent "requiring both sides to lay their evidentiary cards on the table before trial." *Pope*, 613 F.3d at 1259-60.

Even more importantly, the rules governing pretrial motions are designed to draw a hard line between the role of judge and jury. By the time a judge hears a pretrial motion, the grand jury has already indicted the defendant, finding probable cause that there has been a crime committed "within its jurisdiction." *United State v. Levin*, 973 F.2d 463, 472 (6th Cir. 1992) (Martin, J., dissenting). After that occurs, "it is not for the courts to filter which criminal cases may reach the trial stage by reviewing the proffered evidence in advance." *Salman*, 898 F.3d at 1269. Rather, "[a]n indictment returned by a legally constituted and unbiased grandy jury . . . if valid on its face, is enough to call for a trial of the charge on the merits." *Costello v. United States*, 350 U.S. 359 (1956). This standard protects not only the sphere of the grand jury, but also the jury to preside at trial, which in criminal cases is both "[judge] of the facts" and "conscience of the community." Anne Bowen Poulin, *The Jury: The Criminal Justice System's Different Voice*, 62 U. Cin. L. Rev. 1377, 1386, 1392 (1994).

In finding that "the indictment presents no non-speculative evidence on which it may be found that the crime occurred in the district," the lower court effectively granted summary judgment to Meyer, contrary to the urgent policy considerations just discussed. (R. 6). Indeed, the lower court explicitly rebuffs the contention that "a reasonable jury [could] decide that the

crime happened in Lile or that it happened in Minor," invoking the civil summary judgment standard. (R. 6). *See* Fed. R. Civil P. 59. This decision ignores the general rule that "[t]he indictment is sufficient if it charges in the language of the statute," *Salman*, 378 F.3d at 1268, and punishes the government for failing to proffer more evidence, contrary to what is required under the limited criminal discovery framework. *Pope*, 613 F.3d at 1259-60.

Appellee might object by pointing to Rule 12(d), which suggests that courts will sometimes make factual findings pretrial. Fed. R. Crim. P. 12(d). But this is not a possibility that the government contests in all cases. Instead, appellant argues only that judges may not weigh the sufficiency of the evidence in this particular context—on a motion to dismiss. *Salman*, 378 F.3d at 1268 n. 5; *DeLaurentis*, 230 F.3d at 660.

Other types of pretrial motions do not intrude on the jury's fact-finding role. A motion to suppress evidence, for example, is uniquely suited to resolution before trial for two reasons. First, judges, not juries, properly decide what evidence is admissible. Second, the question of admissibility is less likely to go to the heart of the circumstances surrounding the alleged offense than would questions concerning dismissal of the case in its entirety. *United States v. Gomez*, 846 F.2d 557 (9th Cir. 1988) (inquiring into whether a search was consensual on a motion to suppress). Granting a motion to dismiss for improper venue, by contrast, involves a finding of fact likely to be considered by the jury in a trial on the merits.

II. Assault of a flight attendant is a crime involving transportation in interstate commerce and ought to be governed by 18 U.S.C. § 3237.

18 U.S.C. § 3237(a) lies venue for "any offense involving . . . transportation in interstate or foreign commerce" in "any district through, or into which such commerce . . . moves." Here, 49 U.S.C. § 46504 forbids the assault of a flight attendant by "an individual on an aircraft," a crime that would not exist but for the use of transportation in interstate commerce. Section

3237(a) must therefore apply to Meyer's offense and venue must lie in the District of Lile. *U.S. v. Breitweiser*, 357 F.3d 1249, 1253 (11th Cir. 2004) ("To establish venue [under § 3237(a)], the government need only show that the crime took place on a form of transportation in interstate commerce.").

The lower court and others insist on a connection between the conduct elements of an offense, *e.g.*, assault, and transportation in interstate commerce (R. at 11). *United States v. Lozoya*, 920 F.3d 1231 (9th Cir. 2020). But that approach leads to "absurd results," (1) contravening Congress' intent; (2) limiting the trial of offenses to states with little connection to the crime or the defendant, and; (3) immunizing offenders from liability where the precise location of their conduct is in doubt. *Lozoya*, 920 F.3d at 1243-45. (Owens, J., dissenting). Solal Wanstok, *The Sky-High Court: Determining Proper Venue for Crimes Committed on Board Domestic Flights*, 41 U. La Verne L. Rev. 220, 234 (2020).

First, Congress passed 18 U.S.C. § 3237(a) in response to *United States v. Johnson*, 323 U.S. 273 (1944). *Morgan*, 393 F.3d at 199. In *Johnson*, defendant was charged with violating a statute forbidding the use of the mails for sending illicit dentures. *Morgan*, 393 F.3d at 199. The Court held that venue was proper only in the district from which defendant sent the dentures, and not the district in which they arrived. *Id.* In passing § 3237(a), Congress made "offenses involving 'the use of the mails,'" and transportation in interstate commerce, continuing offenses, such that future defendants like Johnson could be tried in "the district of sending, in the district of arrival, and in any intervening district." *Id.*

Here, just as in *Johnson*, the nature of a crime committed in interstate commerce makes it difficult to locate an appropriate venue. Appellee might argue that this difficulty demands a legislative, not judicial, solution, but § 3237 is exactly that—a legislative solution. Its plain text

applies to any crime "involving" transportation in interstate commerce, and its application in this case would vindicate Congress' desire to "remove all doubt as to the venue of continuing offenses and make a special venue provision unnecessary." *Reed Enterprises v. Clark*, 278 F. Supp. 372, 378 (D.C. Cir. 1967).

Second, the principles underlying our constitutional venue provisions disfavor trying a defendant where he has no contacts and where gathering evidence for the crime would prove difficult. *See* Wanstok, *supra*, at 224-25; Megan O'Neill, *Extra Venues for Extraterritorial Crimes? 18 USC § 3238 and Cross-Border Criminal Activity*, 80 U. Chicago L. Rev. 1425, 1448-50 (2013). But where a crime occurs aboard an airplane, all the necessary evidence is tied to the plane and the witnesses inside, not to any particular geographic location. And where the defendant commits a crime above one or more states in a flight path, it is no more likely he will have a connection to the state above which he committed the crime than to any other. Forcing the trial to occur in only the state or states above which the crime occurred would thus do little to further the Framers' intent, while actively undermining that of Congress in passing § 3237(a).

Third, insisting that violations of § 46504 only be prosecuted in the district over which they occurred would in many cases immunize offenders from liability. *Lozoya*, 920 F.3d at 1244-45. (Owens, J., dissenting). The lower court says that "[m]ost cases are not like this one; usually, the government will know when a crime took place." (R. at 11). But this claim is baseless. In 2019, 811 million people flew from one U.S. airport to another; even if only one percent of these people (about 8 million) assaulted a flight attendant, the federal government would not have the resources necessary to determine the exact time that every probable offense occurred. Bureau of Transportation Statistics, *2019 Traffic Data for U.S. Airlines and Foreign Airlines U.S. Flights-Final, Full-Year* (March 19, 2019), https://www.bts.gov/newsroom/2019-traffic-data-us-airlines-

and-foreign-airlines-us-flights-final-full-year. This case proves the point, as even sophisticated black box technology could not determine the precise time at which Meyer assaulted the crew member (R. at 3). It is therefore highly likely that if the district court's ruling is upheld, there is no other venue where Meyer could be tried.

The courts in *Breitweiser* and *Cope* both recognized this problem in determining that § 3237(a) applies to assaults committed on domestic flights. *Breitweiser*, 357 F.3d 1249; *United States v. Cope*, 676 F.3d 1219 (10th Cir. 2012). The *Lozoya* court found these cases "unpersuasive" as they cited no authority for the proposition that § 3237 was a "catchall provision," intended to provide venue in cases where it was inherently difficult to prove. *Lozoya*, 920 F.3d at 1240. But the *Breitweiser* court was not flying blind. Because the "Constitution is unclear regarding venue for offenses that span multiple US districts," it is reasonable to infer that § 3237(a) is gap-filling provision, designed to prevent certain crimes committed in transit from falling through the cracks. O'Neill, *supra*, at 1447.

CONCLUSION

The lower erred in not deferring the question of venue to trial and finding that 18 U.S.C. § 3237 does not apply to violations of 49 U.S.C. § 46504. The government asks that this court reverse the judgment below.

Applicant Details

First Name	**Brittany**
Middle Initial	**N**
Last Name	**Brewer**
Citizenship Status	**U. S. Citizen**
Email Address	**bnbrewer@go.olemiss.edu**
Address	**Address** Street **2998 Old Taylor Rd Apt 1007** City **Oxford** State/Territory **Mississippi** Zip **38655** Country **United States**
Contact Phone Number	**678-913-3455**

Applicant Education

BA/BS From	**Kennesaw State University**
Date of BA/BS	**May 2018**
JD/LLB From	**The University of Mississippi School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=62501&yr=2011**
Date of JD/LLB	**May 8, 2021**
Class Rank	**50%**
Law Review/ Journal	**Yes**
Journal(s)	**Mississippi Law Journal**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Brockington, Brock
brock.brockington@usdoj.gov
Gershon, Richard
igershon@olemiss.edu
601-915-6900

References

Name: Brock Brockington
E-mail: brock.brockington@usdoj.gov
Phone Number: (404)-581-6198
Supervisory Attorney for Legal Internship

Name: Richard Gershon
E-mail: igershon@olemiss.edu
Phone Number: (662)-915-6918
Professor for Wills, Trusts, and Estates and Legal Profession
Faculty Mentor for Law Journal Comment

Name: Meaghin Burke
E-mail: amburke@olemiss.edu
Phone Number: (662)-801-2312
Supervisor for Research Assistant Position

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Brittany Brewer

2998 Old Taylor Rd Apt 1007 Oxford, MS 38655 | bnbrewer@go.olemiss.edu | 678-913-3455

August 21, 2020

The Honorable Elizabeth W. Hanes
United States District Court for the Eastern District of Virginia
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing to apply for a judicial clerkship position in your chambers for the 2021-2023 term. Currently, I am a third-year law student at the University of Mississippi School of Law and an Executive Articles Editor for Volume 90 of the *Mississippi Law Journal*.

I believe that my experience and demonstrated commitment to public service will prove to be a beneficial addition to your chambers. By interning at different prosecutor's offices, I have developed a service-oriented mindset that has allowed me to see the bigger picture behind how our legal actions affect the greater community. Particularly, while interning at the United States Attorney's Office for the Northern District of Georgia, I drafted legal memoranda on complex issues spanning from Fourth Amendment searches to unethical physicians working in pill-mills. As a result of this legal research and writing experience, I have become accustomed to meeting strict, overlapping deadlines and drafting legal documents in a concise, analytical manner.

Furthermore, my participation on the *Mississippi Law Journal* has allowed me to further hone my research and writing skills. Through our comment writing development program, I performed extensive international and localized legal research for my comment that was later selected for publication. Moreover, by frequently reviewing and editing scholarly articles, I have developed an attention to detail that is crucial for success as a law clerk. I am confident that my skills and experiences will make me a suitable law clerk for your chambers.

I have enclosed a resume, list of references, law school grade sheet, two letters of recommendation, and a writing sample for your review. I would welcome the opportunity to discuss my candidacy with you. Thank you for your consideration.

Sincerely,
Brittany Brewer
Brittany Brewer

BRITTANY BREWER
2998 Old Taylor Rd., Apt 1007, Oxford, MS 38655
678-913-3455 – bnbrewer@go.olemiss.edu

Education

The University of Mississippi School of Law, J.D. expected, May 2021
GPA: 3.31/4.00 | Class Rank: 52 out of 145 | Top 36%
Activities: *Mississippi Law Journal*, Executive Articles Editor, Volume 90
Black Law Student's Association
Public Interest Law Foundation

Kennesaw State University, B.S. in Criminal Justice, 2018
GPA: 3.67/4.00, *cum laude*
Activities: Alpha Phi Sigma Criminal Justice Honor Society
Kennesaw State University Police Explorers

Experience

Mississippi Law Research Institute, Oxford, MS
Research Assistant Summer 2020
Organized headnotes for Mississippi Supreme Court, Mississippi Court of Appeals, and Fifth Circuit Court of Appeals cases spanning May 2019 - July 2020 for use in the Mississippi Prosecutors' Trial and Training Manual, as well as the Law Enforcement Handbook.

Cobb County District Attorney's Office, Marietta, GA
Trial Division Law Intern Summer 2020
Drafted arraignment preparation forms to determine appropriate sentencing recommendations and conditions. Drafted an accusation and a response to a motion to dismiss. Attended plea hearings, juvenile court, and probation revocation hearings. Argued probable cause and bond hearings under the Third-year Practice Act.

The George C. Cochran Innocence Project, Oxford, MS
Student Legal Clinician Fall 2019
Served as one of eight students in a clinic dedicated to exonerating those wrongfully convicted. Discussed Post-Conviction Litigation, *Batson*, Forensic Fraud, and Eyewitness Identification Error. Performed mock bail arguments. Reviewed trial transcripts (opening statements, witness testimony, closing statements) to learn more about client's case. Analyzed client's pre-incarceration medical records to help determine potential future defenses. Conducted client screenings to determine program eligibility.

United States Attorney's Office - Northern District of Georgia, Atlanta, GA
Summer Law Intern – Narcotics and Dangerous Drugs Division Summer 2019
Served as one of two interns in the Narcotics Division centered around pill-mills and drug searches under the Fourth Amendment. Conducted extensive legal research on difficult legal issues, such as collateral estoppel, *Miranda*, and the Jencks Act, using Westlaw and LexisNexis. Drafted legal memoranda and jury instructions. Attended trials, jury selection, sentencing hearings, oral arguments at the Eleventh Circuit Court of Appeals, and witness preparation meetings. Toured various agencies, including FBI Atlanta, U.S. Customs and Border Protection at Hartsfield-Jackson Airport, the Drug Enforcement Agency, and the U.S. Securities and Exchange Commission.

Cobb County District Attorney's Office, Marietta, GA
Undergraduate Investigations Intern Summer 2017
Downloaded and burned police body camera and dash camera footage onto discs to be included in relevant case files. Obtained certified case file copies from the clerk's office. Utilized Tracker to organize and summarize case files.

Publication

Brittany Brewer, Comment, *Avoiding Prison Bars, But Gaining a Bar to Inheritance: A Statutory Solution for the Insane Slayer Through a Comparative Approach*, 89 MISS. L. J. ____ (forthcoming 2020).

Brittany Brewer
The University of Mississippi School of Law
Cumulative GPA: 3.31

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure I	John Czarnetzky	A-	3	
Contracts	Stacey Lantange	B+	4	
Legal Research and Writing I	Jason Derrick/ Catherine Hester	B+	4	
Torts	Larry Pittman	B+	4	

Winter Intersession 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Contract Negotiation and Drafting	William Berry	C+	3	

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure II	Farish Percy	B+	3	
Constitutional Law I	Michelle Alexandre	B+	3	
Criminal Law	Michael Hoffheimer	A-	3	
Legal Research and Writing II	Jason Derrick/ Catherine Hester	A-	2	
Property	Desiree Hensley	B	4	

Summer 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Intermediate Legal Research	Catherine Hester	Z	1	

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Academic Legal Writing	Matthew Hall	A	3	
Clinics: Innocence Project	Tucker Carrington	A-	3	
Criminal Procedure I: Investigation	Matthew Hall	B	3	
Mississippi Law Journal		Z	1	
Wills and Estates	Richard Gershon	B	3	

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Advanced Torts	William Berry	P	2	

Corporations	John Czarnetzky	P	3
Evidence	Farish Percy	P	3
Immigration Law	Matthew Hall	P	3
Legal Profession	Richard Gershon	P	3

The Spring 2020 Semester was graded as mandatory pass/fail as a result of the COVID-19 pandemic.

Grading System Description

Grades with Grade Point Values:
A+ = 4.3
A = 4.0
A- = 3.7
B+ = 3.3
B = 3.0
B- = 2.7
C+ = 2.7
C = 2.0
C- = 1.7
D+ = 1.3
D = 1.0
D- = 0.7
F = 0.0

Grades with No Grade Point Value:
Z = Pass
X = Audit
W = Withdrawn
I = Incomplete

U.S. Department of Justice
United States Attorney's Office
Northern District of Georgia

Richard B. Russell Federal Building
75 Ted Turner Drive SW - Suite 600
Atlanta, Georgia 30303

Telephone: (404) 581-6000
Fax: (404) 581-6181

August 21, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr. U.S. Courthouse
701 East Broad Street - 5th Floor
Richmond, Virginia 23219

Dear Judge Hanes:

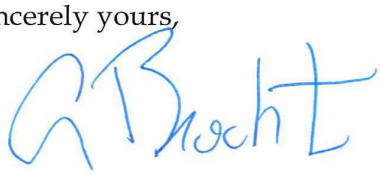
I am writing to recommend Brittany Brewer as a candidate for a Judicial Clerkship in your Chambers. During the summer of 2019, Ms. Brewer served as a summer intern in the Narcotics and Dangerous Drugs Section of the United States Attorney's Office for the Northern District of Georgia. During her internship, Ms. Brewer worked largely under my supervision, and I therefore had ample opportunity to observe her demeanor and work habits, as well as to review her legal research and writing. After working in tandem with her, I can see that she has all the makings to evolve into an excellent federal law clerk. Even as an intern, she made significant contributions to the cases on which she worked. As a law clerk, I know she will bring the same confidence and acumen I saw from her last summer, and I believe she will make for a pleasant addition to your Chambers.

Ms. Brewer proved to be a talented, intelligent, and effective intern. She was eager to dive into new projects from the moment they were assigned to her. She quickly identified the important issues, and it was clear that she was undaunted by the nuances of federal criminal law. During her internship, Ms. Brewer assisted multiple federal prosecutors on cases at various stages, from evidence suppression issues to jury instructions.

One matter in particular was a research memorandum that she drafted for me just days before my trial in an illegal prescribing prosecution of a board-certified anesthesiologist. Specifically, the parties were litigating the Government's production obligations concerning an expert witness, and whether certain information, including prior testimony in other cases, and past retention agreements, were subject to the Jencks Act. Despite having no prior experience with this area of the law, and having to operate under a tight deadline, Ms. Brewer drafted a concise memorandum that succinctly outlined the Government's position. I was able to use her unedited work product in a court pleading that convinced the court to rule in the Government's favor, and this decision brought to conclusion a series of contentious pre-trial motions and briefs. With no more cards to play, the defendant resolved his case by way of guilty plea on the day before jury selection. This was just one of several examples, of Ms. Brewer's good work last summer. Over the course of her internship, I was particularly impressed by the sheer volume of projects that she was able to handle – she finished tasks quickly and was always available to take on new work.

Ms. Brewer's hard work continued beyond the summer of 2019; she was selected to join the editorial board of the Mississippi Law Journal, and her Note will be published later this year. Ms. Brewer has laid the groundwork for a very successful law school career, and I am confident that once she has graduated, she will be ready to tackle the cases to which she is assigned as a federal law clerk. If you would like to speak further about Brittany Brewer's qualifications as a candidate, please do not hesitate to contact me.

Sincerely yours,



C. BROCK BROCKINGTON
Assistant United States Attorney

I. Richard Gershon
Professor of Law
University of Mississippi School of Law
Robert C. Khayat Law Center
Post Office Box 1848
University, MS 38677-1848
(662) 915-6918
Fax: (662) 915-6895
igershon@olemiss.edu

April 9, 2020

RE: Recommendation of Brittany Brewer

Dear Judge:

I am honored to recommend Ms. Brittany Brewer for a position as your judicial clerk. Ms. Brewer has been an extraordinary student at the University of Mississippi School of Law, and she has been a standout in the two classes she has taken with me. Brittany has been a regular participant in classroom discussions, and her insights and intellect have been tremendous assets to those discussions.

Judge, I know you need someone in your chambers who you can trust with sensitive material. Ms. Brewer is that person. She conducts all activities with the highest level of integrity, professionalism, and maturity. I have no doubt that she would continue to do so as your judicial clerk. She also possesses excellent writing ability, as witnessed by her article that was accepted for publication this semester. I had the pleasure of advising her on that project.

In addition to her other attributes, Ms. Brewer combines her superior aptitude with a great attitude. She is liked and respected by all members of our law school community. I am certain that you would enjoy working with her.

Accordingly, I recommend that you hire Ms. Brittany Brewer without reservation. Please call on me if you have any questions about her candidacy, or if I can be helpful in any way.

Sincerely,

I. Richard Gershon
Professor of Law

WRITING SAMPLE

Brittany Brewer

2998 Old Taylor Rd

Apt 1007

Oxford, MS 38955

The attached writing sample is a motion written for my Legal Research and Writing II course. By weighing the factors from *Barker v. Wingo*, this motion argues in favor of the defendant's indictment being dismissed with prejudice.

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF MISSISSIPPI

Southern Division

UNITED STATES OF AMERICA

Plaintiff

Cause No. 2014-CR-01323

v.

ARCHIBALD "SAILOR" RIPLEY

Defendant

MOTION TO RECONSIDER ORDER DISMISSING INDICTMENT WITH PREJUDICE

Preliminary Statement

The right to speedy trial is an enumerated right guaranteed to citizens of the United States by the Bill of Rights. Although it is a seemingly positive right bestowed upon us by the founding fathers, this right has the ability to backfire with dire societal consequences, including but not limited to, recidivism, overcrowded institutions, and bad-faith tactics in the courtroom. A violation of the right to speedy trial prompts the court to conduct a balancing test consisting of four prongs: the length of the delay, the reason for the delay, the defendant's assertion of the right, and the prejudice to the defendant. All of these factors are weighed in consideration of either the prosecution or the defendant. Archibald Ripley is asserting that his right to a speedy trial has been violated due to the delay and the prejudice he allegedly faced. However, under the Barker balancing test, we have determined that he does not meet the sufficient threshold set forth in *Barker* because, no actual prejudice was found, the reason for delay was not caused by the Government, and because Ripley knew that he was a suspect before he left the country. Therefore, this Motion to Reconsider the Order Dismissing Indictment with Prejudice should be granted.

Statement of Facts

It was a hot, June day in 2012 when Civil War enthusiast and re-enactor, Archibald "Sailor" Ripley was on an excursion to Ship Island, Mississippi for an employee appreciation event.

At the event, was a tour of a multi-room exhibit that held historical artifacts from former soldiers assigned to the fort. One soldier in particular was Colonel Nathan W. Daniels. According to his testimony of the alleged events from this day, Mr. Ripley asserts that he spent that day with Mary Cross, promptly went to the ship afterwards, and never returned to the fort. The indictment tells a fairly different story, however. It is alleged that Mr. Ripley was at the exhibit, that he used a glasscutter to cut into the glass case, and promptly stole Colonel Daniel's personal diary, his .44 caliber Colt New Model Army revolver, and documents regarding his commission as an officer in the Union Army. The artifacts he took were estimated to only be worth $1000, however according to the testimony of Ms. Durango, park ranger on Ship Island, the artifacts could be worth $10,000 in the eyes of a Civil War enthusiast. Ripley has always been the sole suspect in this case. He was interviewed by the FBI on October 15th, 2012. During this time, Ripley was informed that he was a suspect, however, he was not told that he had to alert authorities if he wanted to relocate, that he was under arrest, and thus never told the authorities that he had plans to go work in Egypt. In addition, he never disclosed his romantic, inappropriate relations with Mary Cross with the fear of being fired and ensuing family drama. Along with being interviewed, Ripley also voluntarily gave his blood. On March 22th, 2018, multiple discovery requests were made about the blood. Good faith efforts were made to obtain the blood results. On May 31st, 2018, however, a tornado completely destroyed the evidence locker that contained the blood evidence and the directory that was used to help identify Ripley.

Prior to the crime on June 9th, 2012, 37-year-old Mr. Ripley was working steadily at FirstAid. There, he met and had romantic relations with the late 17-year-old Mary Cross. During a family dinner, Mary Cross was intoxicated and released information to her family about her relations with Archibald Ripley. Reacting to this information, Karl Cross, Mary Cross's uncle, fired him from FirstAid on the spot for inappropriate relations. Following his termination, Mr. Ripley started his job search that ended unsuccessfully. He then decided that he would begin work at the Lillian Thrasher Orphanage in Asyut, Egypt as a volunteer pharmacist position at the medical clinic. He returned on March 7th, 2015 from Egypt. Ripley's indictment was filed on April 8th, 2014. However, during his departure from the United States, Agent Gifford attempted to serve the indictment, but failed due to an incorrect place of employment. Gifford then tried to locate Ripley on the NCIC database. Many mistakes were made in the process. First, he mistakenly typed in Archibald Shipley instead of Archibald Ripley. Second, he neglected to input information about his social security number, his birthday, operator's license number, originating case number, or FBI fingerprint number. Third, another agent involved failed to give Gifford Ripley's social security

number. Lastly, he failed to contact the pharmacy licensing board for personal information about Ripley. The Government tried to find Ripley but was faulty in its execution. Ripley was eventually found and arrested for speeding. On January 9th, 2018, Ripley had his arraignment hearing to which he asserted his first speedy trial demand. This demand was denied by the court due to an overcrowded docket. His next demand for a speedy trial came on February 5th, 2018. Regarding this demand, the court decided that the trial that commenced on June 28th, 2018 would not conclude and must be continued. The original trial date was set for August 7th, 2018 and would be continued to February 25th, 2019. On February 26th, 2019, Ripley filed a Memorandum Opinion and Order expressing his desire to move to dismiss the indictment for a violation of his right to speedy trial under the Sixth Amendment; the motion was granted the same day. This motion should not have been granted and should be reconsidered, because when applying and weighing the factors under the Barker balancing test, it clearly weighs in favor of the Government. Thereby saying that the Government is not at fault for Ripley's delay in trial.

Argument

I. The Court Should Reconsider the Order Dismissing Indictment with Prejudice Because it is Erroneous.

Under the Sixth Amendment of the Constitution, citizens are granted the right to a speedy trial. *United States v. Villarreal*, 613 F.3d 1344, 1349 (11th Cir. 2010). However, all rights have the possibility of being violated at some point in time. To determine whether there has been a violation of a right to speedy trial, the court utilizes a balancing test, in which the defendant and the prosecution are weighed. *Barker v. Wingo*, 407 U.S. 514, 530 (1972). This balancing test contains four factors: the length of the delay, the reason for the delay, the defendant's assertion of his right, and the prejudice to the defendant. *Id.* Ultimately, the single remedy for a speedy trial right violation is dismissal of the indictment. *United States v. Molina-Solorio*, 577 F.3d 300, 304 (5th Cir. 2009).

A. The Length of Delay is Presumptively Prejudicial, and Therefore a Complete Barker Analysis is Required.

According to *Barker*, the length of delay serves as the "triggering mechanism." *Barker*, 407 U.S. at 530. In other words, unless the delay contains presumptive prejudice, it is not imperative to look into the other three factors: reason for delay, defendant's assertion of the right, and prejudice. *Id.* If the delay extends past one year, it is normally deemed to be presumptively prejudicial and weighs against the Government. *Villarreal*, 613 F.3d at 1351. Further, the longer that the duration between the indictment and trial exceeds past the minimum, the more weight in

favor of the defendant. *Molina-Solorio*, 577 F.3d at 305. The pretrial delay is calculated from the time the Sixth Amendment right attached until the trial. *Villarreal*, 613 F.3d at 1350.

The relevant dates are as follows: Ripley's indictment was filed in April 8th, 2014, Ripley was arrested for speeding on January 7th, 2018, and Ripley's jury trial was on February 25th, 2019. Ripley made two demands for a speedy trial, on January 9th, 2018 and February 5th, 2018, respectively. Based on the rule under *United States v. Villareal*, the pretrial delay in this case would be from January 9th, 2018 to February 25, 2019; or 1 year, and 48 days. The other durations are as follows: there are 3 years, and 9 months from the indictment to arrest, 1 year and one month from arrest to trial, and 4 years and 10 months from indictment to trial. Due to the duration between the indictment and the trial exceeding past the minimum of one year for presumption of prejudice, this factor weighs heavily in favor of Ripley under the rule in *Molina-Solorio*. Thus, the length of delay factor is triggered, and it is necessary to balance the remaining three factors.

B. Good Faith Negligence is an Insufficient Reason for Delay.

The Government has the burden of constructing a sufficient reason for the delay. *Id.* at 1351. According to *United States v. Avalos*, there are three main types of delay: deliberate delay, negligent delay, and justified delay. *United States v. Avalos*, 541 F.2d 1100, 1111-15 (5th Cir. 1976). Further, there are a few ways the reason for the delay can be weighted. First, if the Government acts in bad faith by delaying the prosecution in order to achieve an advantage at trial, the weight will tip heavily towards the defendant. *Molina-Solorio*, 577 F.3d at 305. Second, a purposeful attempt to delay the trial to handicap the defense is weighed against the Government. *Barker*, 407 U.S. at 531. However, negligence by the Government will weigh more lightly than a purposeful intent to impair the defense. *Molina-Solorio*, 577 F.3d at 305. Along with negligence, overcrowded dockets are weighted lightly against the Government as well. *Barker*, 407 U.S. at 531. Lastly, a lost witness constitutes an appropriate delay. *Id.*

In the case at hand, there were multiple reasons for the delay. It started with Ripley moving to Egypt on March 8th, 2014. While he was abroad, his indictment was filed on April 8th, 2014; an exact month to when Ripley left. While the indictment was unsuccessfully delivered to Ripley, due to an unknown address, indictments do not need to be delivered to the defendant. Once the grand jury returns a true bill (as they did here), the prosecutor can bring the case to trial. Therefore, the unsuccessful delivery of the indictment should not be held as a factor in the reasoning for the delay of the court process. Another reason for delay was the tornado destroying

the evidence locker that contained the blood evidence and the directory. In torts, a tornado is considered an "act of god." An act of god is an act that is completely out of human control and carries no liability. Therefore, even though the delay of the blood evidence caused delay in the court process, it should not weigh against the Government. Thirdly, the first speedy trial delay was denied due to an overcrowded docket. Overcrowded dockets do not weigh heavily against the Government as *Barker v. Wingo* concluded. The last reason for delay, was the Government's negligence in inputting Ripley's personal information into the NCIC database. However, this negligence was based on good faith error. People make mistakes all the time, therefore it is common to make one and just negligence on their part. If the Government failed to seek the defendant diligently, depending on whether the seeking was made in good or bad faith, that can weigh against the Government accordingly. *Villarreal*, 613 F.3d at 1351. Thus, because the Government acted in good faith when attempting to locate Ripley, this factor should not weigh against the Government.

C. Ripley's Assertion to Speedy Trial is Partially Inadequate.

The assertion of a right to speedy trial carries heavy evidentiary weight in concluding whether the right has actually been violated. *Barker*, 407 U.S. at 532. In other words, if the defendant does not assert his right, the court may never realize that the right has been violated nor does it show that the defendant even realizes that his right has been deprived. *Id.* This factor weighs against the defendant if he waits too long to assert his right. *Molina-Solorio*, 577 F.3d at 306. Moreover, if the defendant is not fully aware of the charges against him, he is not punished for asserting his right to a speedy trial after the arrest. *Id.*

Ripley was arrested on January 7th, 2018. Two days later, Ripley asserted his first demand for a speedy trial at his arraignment hearing on January 9th, 2018. However, this assertion was denied by the court. Ripley, then, made his second demand at a speedy trial on February 5th, 2018; just 27 days after the first demand. It can be determined then, that Ripley was aware that he needed to assert the right to speedy trial.

On the other hand, according to a witness named Mr. Gifford, Ripley was neither told that he needed to alert authorities if he decided to relocate nor was he ever told that he was under arrest. Therefore, based on the rule in *Molina-Solorio*, Ripley should not be punished for failing to assert his speedy trial right until after arrest. However, on October 15th, 2012, while Ripley was being interviewed by an FBI agent, he was informed that he was a suspect in a crime. Analogous to the defendant in *United States v. Villarreal*, who contended that he demanded his right for a

speedy trial in the appropriate timeframe, was denied by the court on the grounds that he knew that the Government was looking for him. *Villarreal*, 613 F.3d at 1354. A reasonable person would understand that when they are a suspect in a crime, the agent customarily tells them not to go far. Ripley did the opposite. Therefore, just as the defendant in *United States v. Villareal*, this factor should be held only moderately against the defendant.

D. None of the Concerns About Prejudice Are Present in Ripley's Case.

Prejudice can come in the form of the death of a witness, a disappearance during the delay, and if a witness is not able to remember events from the distant past. *Barker*, 407 U.S. at 532. Generally, if the first three factors in the analysis are met in the defendant's favor, then most courts hold that there is a presumption of prejudice, and thus alleviates the burden of the defendant. *Molina-Solorio*, 577 F.3d at 307. However, there can be an exception if the presumption of prejudice is "extenuated as by the defendant's acquiescence" or is "persuasively rebutted." *Id.* If either of these happen, then the Government can still succeed. *Id.* According to *Barker v. Wingo*, prejudice is evaluated according to the interests of the defendant. *Barker*, 407 U.S. at 532. These interests include: the prevention of oppressive pretrial incarceration, the minimization of anxiety and concern for the accused, and to limit the possibility that the defense will be impaired. *Id.* In the case at hand, none of these interests have been met, and therefore are not relevant. Ripley was never incarcerated pretrial, further, there was never any anxiety or concern for Ripley that needed to be minimized nor was there any true possibility that the defense would be impaired. Furthermore, prejudice is not inferred in instances where the Government has pursued the defendant with "reasonable diligence" from his indictment to arrest. *Molina-Solorio*, 577 F.3d at 305. In essence, the less amount of prejudice a defendant undergoes, the less likely a speedy trial violation will be discovered. *Id.* at 304.

Although prejudice can manifest in many forms, Ripley has not suffered enough prejudice to warrant weight in his favor. According to *United States v. Harrison*, the court very explicitly states that, the loss of a witness or memories are speculative and are not sufficient to show the actual prejudice needed. *United States v. Harrison*, 918 F.2d 469, 474 (5th Cir. 1990). Therefore, just because there was the small possibility that before her death, Mary Cross could have been a potential witness in Ripley's recollection of the day on Ship Island, does not matter. Additionally, when testifying, Karl Cross was having trouble remembering how exactly Mary explained to him that Ripley did not do it. Analogizing this situation to *United States v. Lucien*, the defendant believed that the Government was to blame for the disappearance of the sole eyewitness in the

case. *United States v. Lucien*, 61 F.3d 366, 370 (5th Cir. 1995). Further, the defendant could not demonstrate how the missing testimony was relevant, and the court held this did not establish actual prejudice. *Id.* Therefore, the lack of Cross's testimony does not constitute actual prejudice.

Ripley may try to argue that Farragut, who was a witness in the case, prejudiced him. Farragut was 12-years-old at the time of the incident, and because of her age and the length of time that had passed, she had trouble remembering key details. She used vague characteristics to describe Ripley such as, "not really thin or heavy", "sort of blonde", and "kind of medium old." Further, she flipped through the directory four times before she settled on Ripley, and even lingered on two other photographs other than Ripley. It can be determined then, her recollection of Ripley and the events that took place had deteriorated. Therefore, based on the rule in *Harrison*, lost or failing memories are not sufficient to show actual prejudice.

In this case, blood was analyzed from three sources of the scene, the glass case, the black velvet from the case, and the blood drawn from the defendant. There were reports for the velvet and the defendant, however, there was a missing report for the blood evidence taken from the glass. In *United States v. Lucien*, the court states that a defendant must show that the lost evidence is, "material, exculpatory, and unobtainable" to constitute prejudice. *Id.* at 370. If Ripley argues that the missing report prejudices him, then his argument fails based on the rule in *Lucien*, because he would be unable to determine that the missing evidence is "material, exculpatory, and unobtainable" to his case. Thus, because the lost witness, the missing blood evidence, and the waning memories are all not sufficient to establish actual prejudice, this factor should not weigh against the Government.

II. The Right to Speedy Trial is a "Slippery" Right.

When compared to the other rights guaranteed to citizens under the Constitution, the right to speedy trial is inherently different than the other rights that protect the accused. *Barker*, 407 U.S. at 519. Although there are interests in protecting rights, there is another angle that is in opposition to the rights of the accused. *Id.* The severity of a violation to speedy trial exists in its only remedy: the dismissal of the indictment. *Id.* at 522. This can cause criminals who have committed heinous crimes to walk free without having their day in court. *Id.* This is exactly what would happen should this Motion be denied. Ripley, an alleged thief of artifacts, could walk free, which in turn could lead to recidivism.

According to *Barker v. Wingo*, there are many policy justifications for why there is much controversy surrounding the right to speedy trial. Firstly, robbing the defendant of the right to

speedy trial can prove to be advantageous. *Id.* at 521. In other words, it can prove to be a tactic against the prosecution. *Id.* For example, by the defendant taking advantage of the lack of speedy trial, it can hinder the prosecutions case by their witnesses' fading memories and unavailability. *Id.* Secondly, if the defendant is incarcerated and has his right to speedy trial violated, this can cause overcrowding. *Id.* at 520. Further, it can harm the defendant's moral character while incarcerated. *Id.* Third, if the court cannot provide a speedy trial, this creates a backlog of cases, especially in urban courts. Id. at 519. Additionally, when there is a backlog of cases, this can cause two main issues: it allows the defendant to more efficiently negotiate for better pleas and causes recidivism among defendants on bond. *Id.* Lastly, there is extreme cost surrounding lengthy pretrial detention. *Id.* at 520.

All rights are not created the same. In fact, according to *Barker*, the right to a speedy trial is often said to be "vaguer" than the other procedural rights. *Id.* at 521. It is called vague for the sheer reason that is ambiguous on when the right is completely violated and/or denied. *Id.* In the criminal justice system, there is a concept called the crime control model. One of the aspects of the crime control model, is that the criminal justice system should work like a conveyor belt on an assembly line, moving cases in and out of the system. Similarly, *Barker* held that it is complicated to determine when the right has been violated because the system believes in "swift, and deliberate justice." *Id.* Until all of these policy considerations can be mended, the right to speedy trial under the Sixth Amendment will remain a "slippery" right. This "slippery" right could cause unfavorable results if decided in favor of Ripley. Ripley could recidivate as a result of the dismissed indictment, he could abuse his right to speedy trial by using it as a tactic against the prosecution, and it could set dangerous precedent. For example, other defendants could just leave the country and increase their chances for a delay in speedy trial, in hopes that they will get their indictment dismissed and go free. This scenario is the opposite of what the justice system stands for, and most certainly is not the intention of the right to speedy trial under the Sixth Amendment. Therefore, the indictment should not be dismissed.

Conclusion

The Sixth Amendment guarantees the right to speedy trial, and although this is an important fundamental right, it has been at the heart of much debate in policy. From the overcrowding of institutions to the potential tactical advantage in the courtroom, the way a violation of the right to speedy trial is handled can have consequences on more than just causing the defendant prejudice. For an assertion of a speedy trial violation to hold, it must be weighed in

that party's favor under the Barker analysis. Starting with the length of delay, it weighed in Ripley's favor due to the fact that the delay between the indictment and trial exceeded one year, thus inducing presumptive prejudice. Next, the reason for the delay, weighed in the Government's favor. The tornado, the negligent actions in locating Ripley, and the underlying good faith efforts exerted under this factor, all acted in the Government's favor. Regarding the defendant's assertion of the right, Ripley did demand a right to speedy trial twice in a considerable amount of time, however, this factor still slightly weighed against him, due to the fact that he knew he was a suspect, but still decided to leave the country anyway. The fourth, and final, factor weighed in favor of the Government, because lost evidence, witnesses, or memories do not constitute actual prejudice. Therefore, based on the weight of the scales tipping towards the Government under the Barker balancing test, it can be determined, then, that the Government is not the cause of Ripley's delay in trial. Thus, this Motion to Reconsider the Indictment for Prejudice should be granted.

Brittany Brewer

Applicant Details

First Name	**Michael**
Middle Initial	**A**
Last Name	**Brody**
Citizenship Status	**U. S. Citizen**
Email Address	**mbrody71@gmail.com**
Address	**Address** Street **3016 Estate Orange Grove, Apt. 13** City **Christiansted** State/Territory **Virgin Islands** Zip **00820-4595** Country **United States**
Contact Phone Number	**3017857880**

Applicant Education

BA/BS From	**University of Maryland-College Park**
Date of BA/BS	**May 2013**
JD/LLB From	**George Mason University School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=54701&yr=2011**
Date of JD/LLB	**May 20, 2013**
Class Rank	**Not yet ranked**
Law Review/ Journal	**Yes**
Journal(s)	**Journal of Law, Economics & Policy**
Moot Court Experience	**Yes**
Moot Court Name(s)	

Bar Admission

Admission(s) **District of Columbia, Maryland**

Prior Judicial Experience

Judicial Internships/ Externships **Yes**

Post-graduate Judicial Law Clerk **Yes**

Specialized Work Experience

Specialized Work Experience **Appellate**

Recommenders

Somin, Ilya
isomin@gmu.edu
7039938069

References

1. Daniel P. Jordan (United States District Court Judge) - Shone_Powell@mssd.uscourts.gov (Judicial Assistant) -Office: (601) 608-4120Â
2. Chris Oberst (Bloomberg Law) -coberst@bloomberglaw.com - Office: (703) 341-3000Â
3. Ashley Messenger (Associate General Counsel, National Public Radio) -amessenger@npr.org -Office: (202) 513-2054

This applicant has certified that all data entered in this profile and any application documents are true and correct.

MICHAEL A. BRODY, ESQ.
9508 Wadsworth Drive, Bethesda, MD 20817 * (301) 785-7880 * mbrody71@gmail.com

August 28, 2020

Dear Judge Hanes,

My name is Michael Brody, and I am currently serving as a law clerk at the United States District Court for the Virgin Islands in St. Croix. Next term (September 2020-September 2021), I will be clerking for the Honorable Bernice B. Donald on the United States Court of Appeals for the Sixth Circuit. I am very interested in continuing clerking in the federal judiciary after my term with Judge Donald, and I believe that I have the skills necessary to be of great assistance to you during your next opening.

During my time as a clerk here in the Virgin Islands, I have been so lucky to see such a wide-range of interesting cases, and I have been very busy at work. One of the unique aspects of this experience is that because the local Virgin Islands courts are still in their infancy, we are often taking a stab at some very novel legal issues.

The experience has also afforded me a major opportunity for not only professional growth but personal growth as well. It has been a unique challenge to adapt to an environment that is totally different from anything I have been accustomed to. I have met so many people from so many different countries and backgrounds, and I have loved every minute of it.

I came into this clerkship from a rather unique professional background, having ventured into sports journalism, broadcast media and entertainment prior to entering law school. In my few years since graduating law school, I have worked in complex litigation matters at both the state and federal level. Before landing in St. Croix, I took a brief respite from the traditional practice of law and worked at Bloomberg BNA, where I operated in more of an academic capacity with labor and employment matters.

In addition to my current clerking experience, I have experience externing for Daniel P. Jordan III of the U.S. District Court for the Southern District of Mississippi and for Sally Adkins of the Court of Appeals of Maryland and have practice writing opinions for both of them. They are both prepared to provide strong recommendations should you like to speak to them.

I have a large portfolio of writing samples that I am eager to share, so if you are interested in reading some of my work, I am happy to send you some supplemental documents. Thank you for your consideration, and I look forward to hearing from you soon!

Sincerely,

Michael

MICHAEL A. BRODY, ESQ.

3016 Orange Grove No. 23, St. Croix, U.S.V.I. 00820 * (301) 785-7880 * mbrody71@gmail.com

EXPERIENCE

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, Memphis, TN
Term Law Clerk to the Hon. Bernice B. Donald, United States Circuit Judge (September 2020–September 2021)
I will be joining Judge Donald's staff as a term law clerk in September 2020.

UNITED STATES DISTRICT COURT FOR THE VIRGIN ISLANDS, St. Croix, U.S. Virgin Islands
Term Law Clerk to the Hon. George W. Cannon, Jr., United States Magistrate Judge (March 2019–Present)
Research and draft opinions and bench memoranda on dispositive motions for both civil and criminal cases (for Judge Cannon, Chief Judge Wilma A. Lewis, and Visiting District Judge Malachy E. Mannion), including motions to dismiss, summary judgment motions, preliminary injunctions, motions to vacate or enforce arbitration awards, habeas motions; and appeals of magistrate orders and R&Rs (so long as doing so does not present a conflict with my responsibilities as clerk to the magistrate judge). Assist the judge in all other courtroom proceedings, such as status conferences, oral arguments, and sentencings. Calculate offense levels according to Sentencing Guidelines.

BLOOMBERG LAW (now Bloomberg Industry Group), Arlington, VA
Associate Legal Editor (June 2017–March 2019); *Legal Editor (Contractor)* (January 2015–March 2015)
Analyzed court opinions addressing Title VII, Section 1981, Section 1983, various state anti-discrimination laws, and matters subject to arbitration. Responsible for compiling news, blog entries, long- form academic articles, and ABA publication articles addressing developments in these subject matter areas. Selected for special honors for company marketing project, in which I prepared voluminous data concerning federal judicial appointments.

AMARA LEGAL CENTER, Washington, DC
Pro Bono Attorney (Oct. 2015-March 2019)
Provided legal services in Maryland and D.C. to victims of sex trafficking, assisting them in obtaining restraining orders against abusers. Participated in fundraising and community events to raise awareness for organization.

DAVID, BRODY & DONDERSHINE, LLP, Reston, VA
Part-time Attorney (October 2015-June 2017)
Provided litigation support for government contracts and business law boutique, with cases involving business entity formation, government subcontracting and employment litigation. Worked extensively on post-arbitration briefing in matter regarding termination of subcontractor regarding security clearance issue in Afghanistan.

TYCKO & ZAVAREEI LLP, Washington, DC
Counsel (May 2015-September 2015) (Contract position)
Drafted substantial portion of pre-trial brief in major class action lawsuit involving the state of Virginia, I-95 Express Lanes, and Transurban USA. Provided research, written analysis, and trial and deposition preparation for cases involving consumer protection litigation, commercial litigation, and whistleblower cases.

JOSEPH, GREENWALD & LAAKE, P.A., Greenbelt, MD
Law Clerk (March 2014–December 2014)
Drafted appellate briefs and trial memoranda pertaining to cases involving Maryland Public Information Act requests, medical malpractice, commercial law, personal injury, employment discrimination, attorney discipline and family law. Wrote pre-trial briefing in high-profile trademark infringement/First Amendment case

THE VERNIA LAW FIRM, Arlington, VA
Associate Attorney (January 2014–March 2014) (Three-month assignment)
Conducted case preparation and legal research for cases involving the False Claims Act, white collar crimes and cybercrime. Prepared trial materials and discovery in qui tam cases.

COURT OF APPEALS OF MARYLAND, Annapolis, MD
Judicial Intern to the Honorable Sally D. Adkins (September 2012–January 2013)
Produced bench memoranda, recommended questions for oral arguments, and made written recommendations in cases addressing real estate contracts, ERISA, preemption of Maryland state statutes, and Maryland's Good Samaritan law. Drafted opinions for judge that could be used for majority, concurring, or dissenting opinions.

U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, Jackson, MS
Judicial Intern to the Honorable Daniel P. Jordan, III, District Judge (June 2012–August 2012)
Drafted opinions for cases dealing with FDIC receivership, Title VII, sovereign immunity, and civil rights claims. Researched, penned questions and briefed the judge in preparation for oral argument.

NATIONAL PUBLIC RADIO, Washington, DC
Law Clerk, Office of General Counsel (Jan. 2012–June 2012)
Prepared and co-presented seminar: "What is 'Actual Malice?'," National Public Radio, Washington, DC, March 22, 2012 (Co-presented with Ashley Messenger). Composed memoranda pertaining to First Amendment rights, contractual obligations, discoverability of intra-corporate communications, and FCC notice and comment rulemaking. Wrote a brief to the Department of Treasury appealing a FOIA request denial.

FEDERAL COMMUNICATIONS COMMISSION, Washington, DC
Legal Intern (Oct. 2011–Jan. 2012)
Wrote reports about censorship rules, with a focus on their application to third-party advertisers. Produced policy summaries and organized public comments pertaining to the FCC's proposal for online public files, Internet TV closed captioning, post-licensing issues, and competition in the multichannel video programming marketplace.

SIRIUS XM SATELLITE RADIO, Washington, DC
Associate Producer (Part-time), SiriusXM NASCAR (June 2015-June 2017);
Music Programming Coordinator (Full-time) (June 2008-August 2010)
Worked with hosts and other producers to design overall sound and image of programs, including music, line copy and show content, with a concentration on Octane (active hard rock channel), Willie's Place (traditional country), Hair Nation (glam metal) and Boneyard (classic hard rock), and a variety of live programs.

RED ZEBRA BROADCASTING (WTEM-AM, WWRC-AM, **WGIG-FM)** Rockville, MD
Producer/Reporter (June 2005–January 2012)
Executed soundboard operations for a variety of sports and news programming. Reported on University of Maryland basketball games; provided blogs and audio reports; produced a variety of shows, including "The John Thompson Show" and "Sunday Tee Time with Steve Czaban."

EDUCATION

GEORGE MASON UNIVERSITY SCHOOL OF LAW, Arlington, VA
Juris Doctor, May 2013
Honors: Legal Writing Teaching Fellow; *Journal of Law, Economics & Policy* (Member); *Moot Court* (First-Year Competition and Second-Year Appellate Argument) * Honor Code Committee

UNIVERSITY OF MARYLAND, PHILIP MERRILL COLLEGE OF JOURNALISM, College Park, MD
B.A.. in Journalism, May 2008
Minor: History; Reporter for *The Diamondback* and *The Prince George's County Sentinel;* Member of Kappa Tau Alpha National Honor Society and The National Society of Collegiate Scholars; academic writing tutor

ADMISSIONS

District of Columbia (May 2015) and Maryland (December 2013)

ACADEMIC LEGAL PUBLICATION

"Circumventing the Electoral College: Why the National Popular Vote Interstate Compact Survives Constitutional Scrutiny Under the Compact Clause," Legislation and Policy Brief. Vol. 5: Issue 1, Article 2 (February 2013)

Michael Brody
George Mason University School of Law

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS

George Mason University
Antonin Scalia Law School
3301 Fairfax Drive
Arlington, VA 22201

August 28, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am extremely pleased to have the opportunity to recommend Michael Brody for a clerkship in your chambers.

Michael was my student in Constitutional Law II during the Spring 2012 semester. This course is our standard introduction to the constitutional law of the Fourteenth Amendment. He received a grade of B+, which put him in the upper part of a strong class. He also impressed with his strong class participation, which was among the best in that class.

During the 2011-12 academic year, I was also the faculty adviser for Michael's excellent paper on the constitutional issues raised by the plan to organize state governments to allocate their electoral votes for the presidency to the popular vote winner. The resulting paper was outstanding and, in my view, worthy of publication as a full-fledged law journal article (not just a student note). Michael developed a strong argument as to why this proposal does not violate the Constitution, despite possible objections based on the Compact Clause and other constitutional provisions. The article was in fact eventually published in *Legislation and Policy Brief* in 2013 – a rare case where a student published an academic article before graduating!

Outside the classroom, Michael impresses by his knowledge of legal and political issues and his open-minded approach to competing perspectives. For example, I was generally skeptical of his claims about the national popular vote initiative. But he took this in stride, and his efforts to rebut my objections made his paper even stronger than it was before.

I have kept in touch with Michael since he graduated in May 2013, and he has continued to progress well in his career since then.

Michael is extremely well prepared for a position as a law clerk, thanks in part to his experience working for Bloomberg BNA, his work as a judicial intern for a federal district court in Mississippi, and extensive other experience.

I recommend him in the highest possible terms.

Please do not hesitate to contact me if you have any questions.

Sincerely yours,

Ilya Somin
Professor of Law

Ilya Somin - isomin@gmu.edu - 7039938069

2019 WL 3500913
Only the Westlaw citation is currently available.
District Court of the Virgin Islands, Division of St. Croix.

BRUCE S. HALLIDAY, Plaintiff,
v.
GREAT LAKES INSURANCE SE, ET AL., Defendants.

3:18-cv-00072
|
Filed: 08/01/2019

MEMORANDUM OPINION [1]

GEORGE W. CANNON, JR. MAGISTRATE JUDGE

***1 TO: Neil D. Goldman, Esq.**

Alex M. Moskowitz, Esq.

Before the Court is Plaintiff's Revised Proposed Second Amended Complaint (hereinafter, "Second Amended Complaint" or "SAC"), which the Court construes to be "Plaintiff's Motion for Leave to File Second Amended Complaint" (ECF No. 41). [2] For the reasons stated below, the Court will grant in part and deny in part Plaintiff's Motion for Leave and deny as moot Wager's Motion to Dismiss.

I. BACKGROUND [3]

Plaintiff Bruce S. Halliday (Plaintiff), a citizen and resident of St. Thomas, U.S. Virgin Islands, is the owner of the vessel Kaylara Mai. SAC (ECF No. 41-2) at ¶¶ 1, 2. Defendants are (1) Great Lakes Insurance SE, an insurance company based in Munich, Germany (Great Lakes); (2) Wager & Associates, Inc., a Florida corporation "engaged in the business of Yacht Surveying, Insurance Claim Adjusting, and Insurance Claim Management" (Wager); and (3) Concept Special Risks, Ltd. (Concept), a United Kingdom limited company which "provides underwriting and related services to various insurance companies ... in connection with the insurance of yachts and other vessels." *Id.* at ¶¶ 3-5. The Court has federal subject matter jurisdiction over the case, because the matter arises from a marine insurance contract, *see* 28 U.S.C. § 1333. [4] The Court also has subject matter jurisdiction under 28 U.S.C. § 1332, as the matter in controversy is between a citizen of the United States Virgin Islands (Plaintiff), a citizen of another state within the United States (Wager), and citizens of foreign states (Great Lakes and Concept), and the amount in controversy exceeds $75,000.

***2** In 2008, Plaintiff began insuring the vessel with Great Lakes. SAC at ¶ 12. He renewed the policy in 2015 and again in 2017. *Id.* at ¶¶ 8, 10. Each time, the policy listed the value of the vessel as $300,000. *Id.* at ¶ 12.

On September 6, 2017, the vessel, which was "berthed and properly tied up at the Sapphire Beach Resort and Marina," was damaged by Hurricane Irma. *Id.* at ¶ 13. Plaintiff notified Great Lakes that the vessel had been severely damaged. *Id.* at ¶ 14. Great Lakes engaged Wager to adjust Plaintiff's claim for damage to the vessel, and on December 19, 2017, Wager issued a preliminary report, estimating the cost to repair the vessel to be $130,000. *Id.* at at ¶¶ 4, 15. On March 13, 2018, Plaintiff provided Great Lakes with a report prepared by Timothy E. Davis of Davis Marine Surveying and Adjusting, which estimated the cost of repairs to be between $319,700 and $320,900, and possibly more than $350,000. *Id.* at ¶ 16. Davis had surveyed the vessel in 2015, and, according to Plaintiff, Great Lakes relied upon Davis' assessment of the vessel's value at that time to determine Halliday's premiums. *Id.* at ¶ 16. On March 19, 2018, Wager notified Halliday that it could not rely upon the 2018 Davis report for purposes of adjusting his claim with Great Lakes. *Id.* at ¶ 17. According to Wager, Plaintiff falsely claimed that, in certain regards, the vessel had been damaged by the storm when in fact the damage was the result of poor maintenance. *Id.* Several weeks later, Wager informed Great Lakes that, in its view, Davis' 2015 survey of the vessel "was misleading and contained false information regarding the vessel's value," because Wager's research indicated that the vessel's selling prices were far below the estimates. *Id.* at ¶ 18

On June 7, 2018, Great Lakes examined Plaintiff under oath. *Id.* at ¶ 19. Plaintiff alleges that the examination lasted approximately four hours and that the actual purpose of the examinations was to intimidate him or force him to abandon his claims. *Id.* Subsequently, at Wager and Concept's request, Plaintiff provided them with estimates for the repair of the vessel. *Id.* at ¶ 21. Plaintiff filed the instant action on September 5, 2018. Two days later, Great Lakes notified Plaintiff that it considered his policy "void from inception" on the grounds that (1) the vessel was unseaworthy at the

time of the storm, (2) Plaintiff misrepresented the vessel's value, and (3) the losses Plaintiff sustained were due to lack of maintenance. *Id.* at ¶ 27 (internal quotation marks omitted).

Plaintiff amended his Complaint as of right on September 27, 2018, asserting claims against Wager for negligence, breach of fiduciary duty, and unfair or deceptive business practices (ECF No. 7-1). Wager filed a Motion to Dismiss on November 8, 2018. Plaintiff filed a response on December 21, 2018. (ECF No. 27). Plaintiff then filed a Motion to Amend Complaint on January 28, 2019 (ECF No. 31), deleting his claims against Wager for breach of fiduciary duty and unfair or deceptive business practices, amending his negligence claim against Wager to assert a claim of gross negligence, and adding a new claim against Wager to assert that Plaintiff is a third-party beneficiary of the contract between Great Lakes and Wager for the adjustment of the claim. U.S. Magistrate Judge Miller denied that motion without prejudice on April 8, 2019, on the grounds that Plaintiff's proposed amended complaint was structured in a way that made it a "shotgun pleading," curable by further amendment. (ECF No. 40). Halliday filed the instant motion on April 22, 2019. Wager filed a response, and Plaintiff replied. (ECF Nos. 42, 46). Judge Miller held oral argument on June 10, 2019. (ECF No. 47). The undersigned asked for supplemental briefing on July 15, 2019 (ECF No. 53), which the parties then provided (ECF Nos. 54, 55).

II. LEGAL STANDARD OF REVIEW

A. Leave to Amend

***3** Federal Rule of Civil Procedure 15(a)(2) provides that a party who can no longer amend a pleading as of right can still amend by obtaining "the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). Leave to amend the pleadings is generally "freely given." *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Arthur v. Maersk, Inc.*, 434 F.3d 196, 204 (3d Cir. 2006). Notwithstanding this liberal standard, courts will deny a motion to amend on grounds of dilatoriness or undue delay, prejudice, bad faith, or futility. *Dole v. Arco Chem. Co.*, 921 F.2d 484, 487 (3d Cir. 1990). "Rule 15(a)(2) places the burden to make such a showing on the party opposing the amendment." *Price v. Trans Union, LLC*, 737 F. Supp. 2d 276, 279 (E.D. Pa. 2010).

III. THE PARTIES' POSITIONS

Plaintiff's claims against Wager are centered on his allegations: (1) that Wager was negligent, made several false representations, and conducted an overall inadequate investigation regarding the value of the vessel to Great Lakes, thereby injuring Plaintiff by causing Great Lakes to declare the policy void; and (2) that Wager breached its obligations under its contract with Great Lakes ("Adjustment Contract"), thereby injuring Plaintiff, a third-party beneficiary of that contract. SAC at ¶¶ 53, 54.

Wager opposes Plaintiff's motion on the grounds that permitting the proposed amendment would be futile. (ECF No. 42-1 at 1). First, Wager addresses the choice of law provision found in the policy, arguing that because "[t]here are no 'well established, entrenched principles and precedents of substantive United States Federal Admiralty law' on the issue of whether an adjuster owes any duties to an insured," the Court must, per the policy, apply New York law. *Id.* at 5. Next, Wager contends that Plaintiff cannot plead that he was an intended beneficiary of the Adjustment Contract because he cannot plead that he alone could recover for a breach of the contract, as required by New York law. *Id.* at 6. In addition, Wager claims that it is "black letter law" that "an insured is not a third-party beneficiary to a contract between an insurer and an independent insurance adjuster hired by the insurer to investigate a loss." *Id.* at 6 (internal quotation marks omitted). Finally, Wager argues that it would be futile for Plaintiff to plead negligence under New York law because "adjusters cannot be held liable for work performed on behalf of a disclosed principal as they do not owe the insured any duty." *Id.* at 7. Alternatively, without conceding the issue, Wager states that if New York law does not apply, the Court should adopt the majority position that an adjuster owes no duty to the insured. *Id.* At 8.

In his reply, Plaintiff disputes Wager's suggestion that New York law applies to his claims against Wager. (ECF No. 46 at 4-5). According to Plaintiff, the policy's choice of law provision is irrelevant because the counts at issue are made under the common law and the Adjustment Contract.[5] *Id.* at 5. Thus, Plaintiff contends Virgin Islands law governs his negligence claims and, absent a choice of law provision in the Adjustment Contract, also his third-party beneficiary claim. *Id.* Lastly, in response to Wager's claim that he failed to identify a specific duty owed him under the adjustment contract, Plaintiff argues that Wager breached the implied covenant of good faith and fair dealing. *Id.* at 12-13.

IV. DISCUSSION

A. Choice of Law

***4** Virgin Islands common law governs all of Plaintiff's claims against Wager. Even though claims on the insurance policy itself might ultimately require the application of New York law, the Court finds no basis to do so at the motion-to-amend stage of this case, because Plaintiff's negligence claims are firmly grounded in tort law. The Court applies Virgin Islands common law to Plaintiff's negligence claims, because it cannot identify any federal rule governing the construction of a negligence claim brought by an insured against the adjuster of his marine insurance contract. *See generally Calhoun v. Yamaha Motor Corp., U.S.A.*, 40 F.3d 622, 626-30 (3d Cir. 1994) (discussing the application of state law in the absence of federal admiralty law).

Plaintiff's third-party beneficiary claim against Wager—just like his negligence claims against Wager—are not made under the policy but rather under the Adjustment Contract. A federal court sitting in diversity applies local law to determine whether a party is a third-party beneficiary to a contract. *See, e.g., Miree v. DeKalb County*, 433 U.S. 25, 28-29 (1977) (holding that state law determines standing as a third-party beneficiary of a federal contract where the federal interests involved did not necessitate the application of federal common law); *Sovereign Bank v. BJ's Wholesale Club, Inc.*, 533 F.3d 162, 168 (3d Cir. 2008) (applying state law in diversity case to determine whether plaintiff was third-party beneficiary of contract and thus had standing to bring breach of contract claim). Without a copy of the Adjustment Contract stating otherwise, the Court must apply Virgin Islands law at this stage of the proceedings.

B. Negligence

The battle at the heart of this motion is whether tort law permits Plaintiff's negligence claims against Wager or if the lack of privity between the parties is fatal to those claims. Before the Court can answer that legal question, it must first do some internal housekeeping to determine whether Plaintiff's claims are grounded on a theory of ordinary negligence, gross negligence, or both. Plaintiff's proposed amended allegations read as follows:

> COUNT VI NEGLIGENCE (WAGER)
>
> 50. Paragraphs 1-32 are repeated and realleged as fully as if restated.
>
> 51. Wager's actions as described in paragraphs 15, 17, 20, 21, 22, 23, 24, 26 and 26 above breached his duty of care to the Insured.
>
> 52. Wager's acts and omissions as described above were grossly negligent and undertaken maliciously, and with reckless disregard for the Insured's rights.
>
> 53. Wager's gross negligence includes, but is not limited to:
>
> • His failure to timely and adequately investigate, assess and adjust the damage to the Vessel sustained in the Storm;
>
> • Misrepresenting the value of the Vessel as being no more than $60,000, and falsely claiming that the Insured misrepresented the value of the Vessel, when the value was based, at least in part, on a survey performed in 2015 by a ACMS certified marine surveyor, requested by the Carrier, and the Carrier wrote in the Policy that the "Agreed Value" of the Vessel was $300,000;
>
> • Inaccurately claiming that the two doors leading from the walkway on both sides to the aft deck had not blown off as claimed by the insured as alleged in paragraph 17.
>
> • Inaccurately claiming that the vessel was unseaworthy at the time of the Storm as alleged in paragraph 27.
>
> 54. As a direct and proximate result of Great Lakes' negligence, the Insured sustained damages.

SAC at ¶¶ 50-54. The Court reads Plaintiff's proposed amendments as asserting both theories of gross negligence and ordinary negligence. Although it is not entirely clear as to whether Plaintiff intended to abandon the latter theory, the Count itself is labeled as "Negligence," Paragraph 54 of the SAC uses the term "negligence" and not "gross negligence," and Plaintiff's arguments in his papers seem to shift between both theories. The Court will thus proceed under the assumption that Plaintiff is pursuing both theories of negligence. Consequently, the Court must assess whether Virgin Islands law permits an insurance claimant to bring a cause of action against an adjuster under either theory.

***5** While not entirely a matter of first impression in the Virgin Islands, this Court is tasked with resolving this question anew. In *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967, 969 (V.I. 2011), the Supreme Court of the Virgin Islands held that when precedent is lacking on a common law rule, courts in the Virgin Islands must conduct what has become known as a "*Banks* analysis" to determine the

applicable law in the Virgin Islands. A *Banks* analysis requires the balancing of three non-dispositive factors: (1) whether any U.S. Virgin Islands courts have previously adopted a particular rule, (2) the position taken by a majority of courts from other jurisdictions, and (3) which approach represents the soundest rule for the U.S. Virgin Islands. *See Pollara v. Chateau St. Croix*, Civ. No. SX-06-CV-423, 2016 WL 2865874 at *4 (V.I. Super. 2016) (citing *Government of the V.I. v. Connor*, 60 V.I. 597, 604 (2014)). The Court will address each factor in turn.

Concerning the first factor, Virgin Islands law is sparse on whether an insurance adjuster owes a duty of care to a claimant. The only two cases that the Court has identified on this issue appear to be in direct conflict with each other. In *Francis v. Miller*, 26 V.I. 184, 185 (Terr. V.I. Sept. 6, 1991), the plaintiffs were homeowners who had settled with their insurance company on a property damage claim stemming from Hurricane Hugo. They alleged that they were forced into a less-favorable settlement because the insurance adjuster made several negligent misrepresentations to them and failed to promptly adjust their claim. *Id.* The Territorial Court concluded that an adjuster—acting as an agent for the insurance company—could be liable to the plaintiffs if the insurance company was either undisclosed or if the adjuster exceeded the scope of his authority. *Id.* at 186. The court's decision was founded upon principles recited in Section 552 of the Restatement of Torts (Second), which provides:

> (1) One who, in the course of his business, profession, or employment or in any other interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Francis, 26 V.I. at 187-88. Even though the adjuster was not ordinarily in the business of supplying information, the court found that this Restatement rule provided a sufficient basis to support the plaintiff's negligence claim. *Id.*

In 2002, the District Court—sitting in diversity—had an opportunity to tackle the issue in *Benjamin v. Thomas Howell Grp.*, No. Civ. 1996-071, 2002 WL 31573004, at *4 (D.V.I. Apr. 22, 2002), *aff'd sub nom. Benjamin v. Accident Ins. Co. of Puerto Rico*, 90 F. App'x 434 (3d Cir. 2004). In that decision, Judge Moore concluded that the insurance adjuster did *not* owe a duty to the plaintiffs, who had alleged that the adjuster was discourteous and misrepresented their Hurricane Marilyn-related property damage claims to the insurer. *Benjamin*, 2002 WL 31573004, at *1. Judge Moore relied on the Virgin Islands Insurance Code, which defines an "adjuster" as "any person who ... investigates or reports to his principal relative to claims arising under insurance contracts, on behalf solely of either the insurer or the insured," V.I. Code Ann., tit. 22, § 751(a), and an independent adjuster as "an adjuster representing the interests of the insurer." *Id.* at § 751(a)(1). Based on these definitions, Judge Moore wrote:

> The evidence before me shows that [the adjuster] was hired by the [plaintiffs'] insurance carrier to adjust their claim and that [the adjuster] had no contractual relationship with the [plaintiffs] regarding their claim against their insurance carrier. By statutory definition then, [the adjuster] was an independent adjuster who owed its loyalty to the insurer and owed no duty to the insured [plaintiffs] regarding their insurance claims.
>
> ***6** Moreover, even though a party may have a duty of good faith and fair dealing to another, such a duty is limited to those instances where a contract exists.

Id. On that basis, Judge Moore granted summary judgment in favor of the adjuster on both negligence and third-party beneficiary breach of contract claims. *Id.* at *2. In a one-word order, the Third Circuit affirmed Judge Moore's decision. *See Benjamin v. Gen. Accident Ins. Co. of Puerto Rico*, 90 F. App'x 434 (3d Cir. 2004).

Neither *Francis* nor *Benjamin* has been adopted or even mentioned by the Supreme Court of the Virgin Islands from what this Court has been able to determine, and it cannot be said that other local courts have considered the issue, much less that *Francis* or *Benjamin* have become an ingrained component of Virgin Islands jurisprudence. Additionally, these cases are of limited utility to addressing Plaintiff's claims, because they leave unanswered the question of whether an adjuster could be liable to a claimant for gross negligence. [6]

Critical to that question is the scope of gross negligence under Virgin Islands law. Fortuitously, the Virgin Islands Supreme Court provided guidance on that issue last month. In *Brathwaite v. Xavier*, 2019 WL 3287069, at *11 (V.I. July 16, 2019), the court said that gross negligence is equivalent to recklessness and not merely a greater form of ordinary negligence, aligning the Virgin Islands with the minority of states that have said the same. The court rejected the majority rule on gross negligence, which recognizes a four-tiered spectrum of tort liability between (1) ordinary negligence, (2) gross negligence, (3) recklessness, and (4) intentional wrongdoing, in favor of the minority rule's three-tiered spectrum, which recognizes only (1) ordinary negligence, (2) gross negligence, and (3) intentional misconduct. *Id.* at *8. In adopting the more simplified minority rule, the court looked to various provisions of the Virgin Islands Code that limited professional liability to only gross negligence for various occupations. *Id.* at *9. The court rejected the notion that ordinary negligence and gross negligence are merely part of a continuum and, instead, concluded that they are separate causes of action. *See id.* at *8 ("This approach is also favorable in that it equates gross negligence with a state of mind—reckless disregard—that is, at least in theory, *different in quality and not merely degree* from ordinary negligence.") (quoting *Yusuf v. Ocean Properties, Ltd. & Affiliates*, No. SX-15-CV-008, 2016 WL 9454143, at *4 (V.I. Super. Mar. 7, 2016) (emphasis added). To succinctly summarize its rationales underlying the decision, the court wrote:

> ***7** "[T]he conception of gross negligence under the minority rule—as equivalent with recklessness—is wholly consistent with the large majority of references to gross negligence in the Virgin Islands Code. The provisions discussed above expressly condition either civil liability or professional discipline upon a finding of gross negligence and specifically foreclose the possibility of facing such liability or discipline for merely negligent conduct. This suggests that the Legislature [of the Virgin Islands] intended to allow for the imposition of such liability or discipline only where the behavior in question rises to a level of culpability that is categorically different than ordinary negligence. And as the Superior Court observed in *Yusuf*, 2016 WL 9454143, at *4, the minority rule is "favorable in that it equates gross negligence with a state of mind—reckless disregard—that is, at least in theory, different in quality and not merely in degree from ordinary negligence."
>
> In light of these considerations, we find no compelling reason, based upon the statutory usage of the term gross negligence, to adopt the more complicated and less well-defined four-tiered spectrum of tort liability of the majority approach. Rather, we are moved by concerns of simplicity and clarity as outlined both by the Superior Court in *Yusuf*, and by this Court in the discussion above, to conclude that the minority rule—equating gross negligence with recklessness—represents the soundest rule of law for the Virgin Islands. Thus, we hold that in the Virgin Islands, gross negligence means wanton, reckless behavior demonstrating a conscious indifference to the health or safety of persons or property. Moreover, we agree with those courts holding that gross negligence "must be more than any mere mistake resulting from inexperience, excitement, or confusion, and more than mere thoughtlessness or inadvertence, or simple inattention." *See Yusuf*, 2016 WL 9454143, at *4.

Brathwaite v. Xavier, 2019 WL 3287069 at *10. While *Brathwaite* does not address the issue before the Court today, it nonetheless is informative as an indicator that *Francis* and *Benjamin* should be persuasive only regarding adjuster liability for ordinary negligence.

With these considerations in mind, the Court turns toward the second *Banks* factor. The Court notes that most jurisdictions to address this issue have found that a duty of care does not extend from an insurance adjuster to an insurance claimant. *See, e.g., Lodholtz v. York Risk Servs. Grp.*, 778 F.3d 635, 641 & n.11 (7th Cir. 2015) (predicting the Indiana Supreme Court would align itself with the "majority rule in American jurisdictions"); *Danielsen v. USAA Cas. Ins. Co.*, Case No. 3:15-cv-00878, 2015 WL 7458513, at *3 (D. Conn. Nov. 24, 2015) ("The Court agrees with the reasoning in these cases, and concludes that the Connecticut Supreme Court would hold that an independent insurance adjuster retained by an insurance company to adjust an insured's claim does not owe a duty of care to that insured"); *Trinity Baptist Church v. Bhd. Mut. Ins. Servs., LLC*, 341 P.3d 75, 84–86 (Okla. 2014) ("Even if harm to the insured through an adjuster's negligence might be foreseeable to the adjuster, from a policy standpoint it makes little sense to hold that the adjuster has an independent duty when the insurer itself is subject to liability for the adjuster's mishandling of claims in action alleging breach of contract and bad faith."); *Hamill v. Pawtucket Mut. Ins. Co.*, 892 A.2d 226, 230 (Vt. 2005) ("[I]n most cases, imposing tort liability on independent adjusters would create a redundancy unjustified by the inevitable costs that eventually would be passed on to insureds.") (citing *Sanchez v. Lindsey Morden Claims Servs., Inc.*, 84 Cal. Rptr. 2d 799, 802-03 (1999)); *Charleston Dry Cleaners &*

Laundry, Inc. v. Zurich Am. Ins. Co., 586 S.E.2d 586, 588–89 (S.C. 2003) ("We decline to recognize a general duty of care from an independent insurance adjuster or insurance adjusting company to the insured, and thereby align South Carolina with the majority rule on this issue"); *Haney v. Fire Ins. Exch.*, 277 S.W.3d 789, 792–93 (Mo. Ct. App. 2009) ("[A] defendant who contracts with another generally owes no duty to contract non-parties, nor can a non-party sue for negligent performance of the agreement."); *Akpan v. Farmers Ins. Exch., Inc.*, 961 So.2d 865, 874 (Ala. Civ. App. 2007) ("[W]e agree with those courts that have refused to find that an independent adjustor or investigator that was hired by an insurance company to investigate or adjust the claim of one of its insureds owes a duty to the insured."); *Meineke v. GAB Bus. Servs., Inc.*, 991 P.2d 267, 271 (Ariz. Ct. App. 1999) ("We conclude that the relationship between adjuster and insured is sufficiently attenuated by the insurer's control over the adjuster to be an important factor that militates against imposing a further duty on the adjuster to the insured."); *King v. Nat'l Sec. Fire & Cas. Co.*, 656 So. 2d 1338, 1339 (Fla. Dist. Ct. App. 1995) ("Since Florida law does not recognize a cause of action by an insured against an independent insurance adjuster in simple negligence, we affirm the trial court's order granting summary judgment in favor of appellee.").

***8** The courts that have embraced the majority rule generally support their decision with one of two rationales. First, they say, claimants already have a remedy for an adjuster's torts through breach of contract and bad faith actions against their insurers. *Hamill*, 892 A.2d at 230; *see also Trinity Baptist Church*, 341 P.3d at 86; *Charleston Dry Cleaners*, 586 S.E.2d at 589. The insurer ultimately is held accountable for even an independent adjuster's torts, because the insurer "contractually controls the responsibilities of its adjuster and retains the ultimate power to deny coverage or pay a claim." *Hamill*, 892 A.2d at 231. Thus, if a claimant can recover from the insurer in tort, then imposing a duty of care on the adjuster "would allow for potential double recovery" from both the insurer and the adjuster for the same conduct. *Trinity Baptist Church*, 341 P.3d at 86. Second, if adjusters had a duty to the claimant, then it could potentially create " 'an irreconcilable conflict between such duty and the adjuster's contractual duty to follow the instructions of its client, the insurer.' " *Id.* at 85 (internal citation omitted)); *see Hamill*, 892 A.2d at 231 ("Subjecting adjusters to potential tort liability from insureds could create conflicting loyalties with respect to the adjusters' contractual obligations, given that insureds and insurers often disagree on the extent of coverage or the amount of damages"). [7]

Courts in the minority have relied on broad principles of accountability and foreseeability to support a rule allowing for claimants to make negligence claims against adjusters. In *Continental Insurance v. Bayless and Roberts, Inc.*, 608 P.2d 281, 286-87 (Alaska 1980), the Alaska Supreme Court dealt with an insurance claimant who had been sued after a "paint pot" that it owned had exploded, resulting in the death of its user. *Id.* at 283-84. The claimant sued the insurance carrier's subsidiary, which functioned as a claims department, after the insurer threatened to cease its defense of the claimant unless the claimant agreed to a reservation of rights. *Id.* at 287. The claimant sued the subsidiary and prevailed after it was determined that the adjuster had failed to adequately investigate the claim, was not forthcoming about problematic facts during the adjustment process, and even withheld that the carrier had authorized up to $10,000 to settle the claim. *Id.* at 293-94. The court held that the adjuster "could be liable for negligence arising out of a breach of the general tort duty of ordinary care." *Id.* at 287.

Six years later, in *Morvay v. Hanover*, 506 A.2d 333, 334-35 (N.H. 1986), the New Hampshire Supreme Court drew a similar conclusion. There, the claimants' home burned down in a fire, and they sued their insurer's independent investigator who had reported to the insurer that the fire was suspicious, resulting in the denial of the claim by the insurer. *Id.* at 334-35. In finding that liability could extend from the investigator to the claimants, the court wrote:

> [T]hey were fully aware that the plaintiffs could be harmed financially if they performed their investigation in a negligent manner and rendered a report to [the insurer] that would cause the company to refuse payment to the plaintiffs. [They] were also aware that there was a mutual duty of fair dealing between [the insurer] and the plaintiffs. Under these circumstances, we hold that the plaintiffs have stated a cause of action in negligence [against the investigator and the employee.] ....
>
> ***9** ....
>
> Although ... the investigators may give reports only to the insurer, the insured is a foreseeably affected third party.... Both the insured and the insurer have a stake in the outcome of the investigation. Thus, we hold that the investigators owe a duty to the insured as well as to the insurer to conduct a fair and reasonable investigation of an insurance claim and that the motion to dismiss should not have been granted.

Id. at 335.

Five years after *Morvay*, the Mississippi Supreme Court took a narrower approach to the minority rule. In *Bass v. California Life Insurance Co.*, 581 So.2d 1087, 1087 (Miss. 1991), the claimant was denied health coverage for two of her health insurance claims relating to a foot injury. She sued the third-party administrator that handled her claim, alleging that the insurer's denial of coverage was based on an erroneous determination that the claimant's injury diagnosis occurred after her enrollment in the insurance program. *Id.* at 1088. After the trial court gave a directed verdict to the administrator, the Mississippi Supreme Court reversed and remanded. *Id.* at 1089. Relying on a previous Mississippi federal district court opinion, the court said:

> A better approach is the standard placed upon an adjuster/agent in the case of *Dunn v. State Farm Fire & Casualty Co.*, 711 F. Supp. 1359 (N.D. Miss. 1987). In *Dunn*, an adjuster filed a motion to dismiss claiming that Mississippi law provided no cause of action for breach of a fiduciary duty or a duty of good faith. In ruling that no cause of action existed under the facts of that case, the district court explained that an adjuster could be deemed liable to an insured for gross and reckless negligence. That court stated:
>
> > The relationship between an adjuster and the insured is a purely contractual one. The adjuster does not owe the insured a fiduciary duty nor a duty to act in good faith, as the plaintiff claims.
> >
> > An adjuster has a duty to investigate all relevant information and must make a realistic evaluation of a claim. However, an adjuster is not liable for simple negligence in adjusting a claim. He can only incur independent liability when his conduct constitutes gross negligence, malice, or reckless disregard for the rights of the insured.
> >
> > *Dunn*, 711 F. Supp. at 1361.
>
> After consideration of the above jurisprudence, we find that *Dunn v. State Farm Fire & Casualty Co.*, provides the better standard for an adjuster/administrative agent such as VPA. This Court is hesitant to hold adjusters, agents or other similar entities to a standard of ordinary negligence. We will, however, hold them to a standard of care consistent with *Dunn, supra.*

Bass, 581 So. 2d at 1090 (other internal citations omitted).

As to third prong of *Banks*, the Court determines that the best approach for the Virgin Islands is to strike a compromise within the boundaries of the majority and minority rule. Consistent with *Brathwaite* and *Benjamin*[8] and with persuasion from *Bass*, the Court today determines that insurance claimants have a common law cause of action against insurance adjusters for gross negligence but are categorically barred from bringing claims against adjusters for ordinary negligence.

***10** The Court arrives at this decision, in part, through a technical application of the rules that emerged from these three cases. *Brathwaite* states that ordinary negligence and gross negligence are two distinct causes of action under Virgin Islands law. *Benjamin* states that Virgin Islands law does not permit insurance claimants to sue adjusters for ordinary negligence. *Bass* also states that claimants cannot sue adjusters for ordinary negligence but differs from *Benjamin* in that it permits claimants to sue adjusters for gross negligence. This Court finds additional support in the *Brathwaite* decision, because Mississippi is one of the states that uses the gross negligence standard that was ultimately adopted by the Virgin Islands Supreme Court. *See Brathwaite*, 2019 WL 3287069, at *7 ("Gross negligence is that course of conduct which, under the particular circumstances, discloses a reckless indifference to consequences without the exertion of any substantial effort to avoid them.") (quoting *W. Cash & Carry Bldg. Materials, Inc. v. Palumbo*, 371 So.2d 873, 877 (Miss. 1979)).

Further, as discussed in *Brathwaite*, the Virgin Islands Code contains numerous examples of instances where the Legislature has categorically exempted certain classes of individuals from ordinary negligence but not for gross negligence. *See, e.g.*, V.I. Code Ann., tit. 29, § 87(d) (stating that "Board members of the Virgin Islands Housing Authority or the Virgin Islands Housing Finance Authority, while acting within the scope of their duties as board members, shall not be subject to personal or civil liability resulting from the exercise of any of the Authority's purposes, duties or responsibilities, unless the conduct of the member is determined by a court of competent jurisdiction to constitute willful wrong doing or gross negligence."); V.I. Code Ann., tit. 32, § 202(h) ("The member of the Virgin Islands [Horse Racing] Commission while acting within the scope of their duties as members of such Commission, shall not be subject to any personal or civil liability as a result of any of the Commission's actions taken pursuant to its duties and responsibilities, unless the

conduct of the member or members is determined by a court of competent jurisdiction to constitute willful wrongdoing or gross negligence."); V.I. Code Ann., tit. 29, §§ 556(c)-(d) ("No judgment may be rendered against the [Virgin Islands Port] Authority in excess of $75,000 in any suit or action against the Authority with respect to any injury to or loss of property or personal injury or death that is caused by the negligent or wrongful act or omission of an employee of the Authority while acting within the scope of the employee's employment" but not "if the injury, loss of property or death is caused by the gross negligence of an employee of the Authority while the employee is acting within the scope of employment."); V.I. Code Ann., tit. 29, §§ 500(c)-(d) (stating roughly same standard for Waste Management Authority as for Port Authority); V.I. Code Ann., tit. 32, § 84(d) ("Members of the St. Croix Park Authority, while acting within the scope of their duties as members of the Authority, shall not be subject to any personal or civil liability resulting from the exercise of any of the Authority's purposes, duties or responsibilities, unless the conduct of the member is determined by a court of competent jurisdiction to constitute willful wrongdoing or gross negligence.").

Limitations on liability—whether established by narrowing the duty owed or by restricting the types of negligence for which an actor may be liable—are not solely limited to statutes but are also found at common law. Even in very early English common law, it was recognized that holding persons to a general duty of care in all situations was unsustainable. *See* W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS § 53, at 357-58 (5th ed. 1984) ("[I]t should be recognized that "duty" is not sacrosanct in itself, but is only an expression of the sum of total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection."). This concept of a narrower duty received traction in early 20th-century American courts that found that drivers could be liable to guests in their vehicles only for injuries resulting from gross negligence:

> ***11** That opinion (*Heiman v. Kloizner*, 247 P. 1034 (Wash. 1926)) does not definitely fix the degree of lack of care which must be shown by an invited guest before liability will result. It holds that that degree is somewhere between that required where the carriage is one for hire and that necessary to be exercised with reference to the safety of a mere trespasser. From that it must follow that before an invited guest can recover, a showing of gross negligence is necessary.

Saxe v. Terry, 250 P. 27, 28 (Wash. 1926), *overruled by Roberts v. Johnson*, 588 P.2d 201 (1978). Courts have also found that landowners can be liable to persons on the land only for recklessness but not for ordinary negligence:

> The duty owed in a premises liability case is that the landowner simply owes the licensee a duty to warn of unreasonably dangerous conditions, when the licensee neither knows nor has reason to know of the condition and the risk involved. *Whereas, the duty owed in a general negligence claim* is that every person who engages in the performance of an undertaking has an obligation to use due care or to act so as not to unreasonably endanger the person or property of another.

Jahnke v. Allen, 865 N.W.2d 49, 51 (Mich. App. 2014) (emphasis added) (internal citations omitted). Judicially crafted limitations on liability have also been applied to torts in recreational sports, where courts have been careful to allow for liability only when participants engage in severe conduct:

> Vigorous participation in athletic competition is a public policy to be encouraged. *See Hackbart v. Cincinnati Bengals, Inc. and Charles "Booby" Clark*, 601 F.2d 516 (10th Cir. 1979); *Oswald v. Township High School District No. 214*, 406 N.E.2d 157 (Ill. App. 1980); *Ross v. Clouser*, 637 S.W.2d 11 (Mo.1982); *Kabella v. Bouschelle*, 672 P.2d 290 (N.M. Ct. App. 1983). "Fear of civil liability stemming from negligent acts occurring in an athletic event could curtail the proper fervor with which the game should be played." *Ross*, 637 S.W.2d at 14.
>
> However, we also recognize that "organized, athletic competition does not exist in a vacuum." *Nabozny [v. Barnhill]*, 334 N.E.2d at 260. Where, as in the present case, the participants are engaged in an adult competition

> governed by a set of rules, and when the participants know or should know the rules and understand the rules serve to protect the participants, then each player has a duty to the next to comply with those rules. "A reckless disregard for the safety of other players cannot be excused." *Id.* at 261.
>
> We are also mindful that adopting a mere negligence standard could lead to an overabundance of litigation. In a sport, such as hockey, where some risk of injury is inherent in the nature of the game, litigation should not potentially follow every time a participant negligently causes injury. "If simple negligence were to be adopted as the standard of care, every punter with whom contact is made, every midfielder high sticked, every basketball player fouled, every batter struck by a pitch, and every hockey player tripped would have ingredients for a lawsuit if injury resulted.

Archibald v. Kemble, 971 A.2d 513, 518 (Pa. Super. Apr. 23, 2009). Mississippi courts that have applied *Bass* have characterized that case as one setting forth a similar bright-line distinction. *See, e.g., Russell v. New York Life Ins. Co.*, No. 3:98CV006-D-A, 1997 WL 170317, at *4 (N.D. Miss. Mar. 4, 1997) ("[I]t appears that the court raised the standard under which an agent may be held personally liable in tort and excluded individual liability based on mere negligence."); *Gallagher Bassett Servs. v. Jeffcoat*, 887 So.2d 777, 783 (Miss. 2004) ("[An adjuster] may be held independently liable for its work on a claim if and only if its acts amount to any one of the following familiar types of conduct: gross negligence, malice, or reckless disregard for the rights of the insured."). [9]

***12** Following suit, this Court makes its own determination today that adjusters in the Virgin Islands should not be held accountable to a claimant in ordinary negligence for something as simple as a missed call or an honest error during the adjustment process. Imposing that kind of liability on adjusters could create a significant burden on the insurer-adjuster relationship and likely deter adjusters from taking action that would promptly resolve claims.

The principles set forth in *Bass* best illustrate that adjuster liability does not have to be an all-or-nothing proposition. *Bass* created a regime where adjusters owe a duty of care to claimants for egregious actions that constitute gross negligence but did not go so far as *Conner* or *Morvay*, which created broader liability for adjusters. The *Bass* rule is workable in that it limits interference in the insurer-adjuster relationship and allows adjusters to retain mostly free reign to operate within their contractual boundaries, but at the same time creates a check on an adjuster's power. "[J]urisprudence should not be in the position of approving a deliberate wrong," *Bass*, 581 So.2d at 1090, and a claimant should have recourse against an adjuster who operates in a manner that undermines the integrity of an insurance claim adjustment or sabotages what otherwise might be a legitimate claim. Indeed, the type of conduct that could constitute gross negligence on the part of the adjuster might not even create liability for the insurance company. An adjuster should not be able to cloak itself as an agent of the insurer for such behavior. To do so could potentially erode the public's faith in the private insurance process.

The approach adopted by the Court today has also found support in academic circles. Indeed, Professor Stempel explained that courts' unwillingness to find a balance between the majority rule and minority rule is the prime reason that the issue remains contentious:

> The failure of the traditional jurisprudence, in my view, is not its presumptive insistence on contract privity or its respect for the disclosed principal rule of agency. The historical approach has become problematic, not because of the contract underpinnings of the bad faith tort, but because too many courts and litigants have seen adjuster liability as an all-or-nothing proposition. Either the adjuster is liable in bad faith, or the adjuster is immune. There is an intermediate position.The adjuster should ordinarily be protected from imputed liability due to an insurer's misconduct, but the adjuster should be liable for negligence (or certainly for more egregious misconduct such as gross negligence or recklessness) based on basic tort principles and overarching agency axioms that overcome the protection provided by the disclosed principle rule.

Jeffrey W. Stempel, *The "Other" Intermediaries: The Increasingly Anachronistic Immunity of Managing General*

Agents and Independent Claims Adjusters, 15 Conn. Ins. L.J. 599, 618 (2009).

A private adjuster's responsibilities are generally aligned to satisfy the insurance carrier, meaning that the adjuster will often do whatever it can to generate the lowest possible payout on a claim. *See* ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW § 3.10, at 825 (1988). The adjuster's incentives under such an arrangement can have catastrophic consequences for the insured. As a rational market actor, an adjuster knows it could lose business with a carrier if claim payments are too high. While claimants often can anticipate that the adjuster will not be completely disinterested, a different problem emerges when the adjuster intentionally conceals information that the claimant might never know about. Outdated principles regarding privity of contract ultimately have no way of pragmatically addressing that reality. As Professor Stempel wrote:

> *13 Although [managing general agents] and independent adjusters may not have formal contract relations with policyholders or others involved in the transaction, these intermediaries in essence assume the role of the insurer in addressing loss claims. Under these circumstances, courts have been too slow to realize that intermediaries playing this role have also in essence stepped into the shoes of the insurer for these claims and thus logically should be held to the same legal standards governing the insurer. In these cases, both policyholders and other reasonably foreseeable third party claimants should be able to bring claims if injured by the misconduct of the intermediary/insurer.

Stempel, 15 Conn. Ins. L.J. at 624. The Court does not go as far today as Professor Stempel suggests it should, but it accepts his recognition of the shortcomings of traditional tort law to address the modern insurance industry. His apprehensions figure considerably into this Court's decision today. [10]

***14** To reiterate, the Court upholds principles of both the majority and minority rules. The Court finds great persuasion in the reasons underlying the majority rule: irreconcilable conflicts, the possibility of double recovery, and the concern that increased exposure to liability will result in higher costs to the consumer. However, the minority rule creates incentives for fair play during the adjustment process. Further, it allows a claimant to potentially recover damages for a whole category of conduct on the part of the adjuster that might not be available if the claimant were to sue only the insurer. [11] As such, the Court finds that the best approach for the Virgin Islands is to split the baby. The Court finds the majority rule applicable to Plaintiff's ordinary negligence claim and the minority rule applicable to Plaintiff's gross negligence claim.

Accordingly, the Court will deny Plaintiff leave to amend to add his ordinary negligence claim. However, Plaintiff has alleged facts that, if true, would support his claim for gross negligence. Thus, the Court grants Plaintiff leave to amend on that theory.

B. Third-Party Beneficiary

To demonstrate intended beneficiary status, the Virgin Islands Supreme Court has said that:

> [T]he third party must show that the contract reflects the express or implied intention of the parties to the contract to benefit the third party. [When reviewing such a claim, the court] examine[s] the terms of the contract as a whole, giving them their ordinary meaning. The contract need not name a beneficiary specifically or individually in the contract; instead, it can specify a class clearly intended by the parties to benefit from the contract.

Petrus v. Queen Charlotte Hotel Corp., 56 V.I. 548, 555-56 (2012) (quoting *GECCMC 2005-C1 Plummer St. Office Ltd. Partnership v. JPMorgan Case Bank, Nat. Ass'n*, 671 F.3d 1027, 1033 (9th Cir. 2012)) (internal citations and quotation marks omitted); *see also Moorhead v. V.I. Ground Handlers, Inc.*, 1996 WL 35048106, at *2 (Terr. V.I. Oct. 18, 1996).

In this regard, Plaintiff alleges as follows:

COUNT VIII [12] THIRD PARTY BENEFICIARY OF CONTRACT BETWEEN CARRIER AND WAGER (WAGER)

60. Paragraphs 1-32 of this complaint are repeated and realleged as fully as if restated.

61. The Insured was an intended or incidental beneficiary of the contract by which Carrier engaged Wager to adjust the Insured's claim (the "Adjustment Contract").

62. Wager breached its obligations under the Adjustment Contract by its actions as described in this Complaint. As a direct and proximate result of those breaches, the Carrier has, at the instigation and urging of Wager, improperly claimed that the Policy is void, and that the Insured is not entitled to recovery for damages which are properly payable under the policy, and for other relief under the policy.

63. As a direct and proximate result of Wager's breaches of his contract with the Carrier of which the Insured is a third party beneficiary, the Insured has sustained damages in an amount to be determined by the Court.

Wager contends that these allegations—regardless of which jurisdiction's law applies—are insufficient, because they do not establish any intent between Wager and Great Lakes to benefit Plaintiff. Particularly, Wager argues that Plaintiff's allegations are conclusory and that, as a matter of law, an insurance claimant cannot possibly be a third-party beneficiary to a contract between an insurer and an adjuster. (ECF No. 42-1 at 5-6). Wager asks for more than is required of Plaintiff at this stage of the proceedings. To begin, despite any lack of proof, it is highly plausible to infer that Wager and Great Lakes entered into the Adjustment Contract between them governing Wager's services—indeed, it is implausible to infer otherwise. Next, it is likewise plausible that the Adjustment Contract had the sorts of terms that would indicate that Great Lakes procured Wager's services to adjust Plaintiff's insurance claim.

***15** Wager contended at oral argument that Plaintiff is, at best, an incidental beneficiary of the Adjustment Contract and that Wager—as an agent of Great Lakes—can serve only Great Lakes as its master. But, because "[t]he underlying question of whether someone is a third-party beneficiary to a contract is a mixed question of law and fact," *Sanchez v. Innovative Tel. Corp.*, Civil No. 2005-45, 2007 WL 4800351, at *2 (D.V.I. Nov. 30, 2007), making such a determination now—especially without actually viewing the Adjustment Contract—would be inappropriate. Further, the *Francis* case specifically states that "an agent may be personally liable in contract when he acts on behalf of an undisclosed principal or *exceeds the scope of his authority.*" *Francis*, 26 V.I. at 186 (emphasis added). While Plaintiff was aware of the principal —Great Lakes—the allegations within the SAC are consistent with the notion that Wager acted well beyond what Great Lakes authorized it to do.

Although Plaintiff does not specify the source of Wager's breach of the Adjustment Contract, Plaintiff's counsel clarified at oral argument that this allegation was predicated on the breach of the implied covenant of good faith and fair dealing. Because that duty is baked into every contract, the Court will not require Plaintiff to further amend the Complaint to make that point. *See Chapman v. Cornwall*, 58 V.I. 431, 441 (2013) ("[T]he implied duty of good faith and fair dealing arises by implication through the existence of a contract itself."); *see also* Restatement (Second) of Contracts § 205 ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."). A duty of good faith prohibits each party from "act[ing] unreasonably in contravention of the other party's reasonable expectations. A successful claim ... requires proof of acts amounting to fraud or deceit on the part of the employer." *Chapman*, 58 V.I. at 441 (citing *Francis v. Pueblo Xtra Intern., Inc.*, 412 F. App'x 470, 475 (3d Cir. 2010)); *see also Pennick v. V.I. Behavorial Serv.*, D.C. Civ. App. No. 2006-0060, 2012 WL 593137, at *3 (D.V.I. Feb. 22, 2012)).

For these reasons, the Court will grant Plaintiff leave to amend to assert a third-party beneficiary claim against Wager. [13]

V. CONCLUSION

Based upon the foregoing, the Court will **GRANT IN PART and DENY IN PART** Plaintiff's Motion for Leave to File Second Amended Complaint (ECF No. 41). The Court will **GRANT** Plaintiff leave to amend 1) Count VI to add a gross negligence claim and 2) Count VIII to add a third-party beneficiary claim. The Court will **DENY** Plaintiff leave to amend 3) Count VI to add an ordinary negligence claim. The Court will also **DENY** as **MOOT** Wager's Motion to Dismiss (ECF No. 23). An appropriate Order accompanies this Memorandum Opinion.

ENTER:

All Citations

Slip Copy, 2019 WL 3500913

Footnotes

1 On March 8, 2019, the parties consented to the referral of the case to U.S. Magistrate Judge Ruth Miller for all purposes, and, on March 11, 2019, the matter was so referred. (ECF Nos. 35, 38). On June 21, 2019, Judge Miller entered an Order of Recusal (ECF No. 52), and the matter was reassigned to the undersigned for all further proceedings.

2 The operative docket entry upon which Plaintiff seeks relief is stylized as "Notice of Filing Revised Proposed Second Amended Complaint by Bruce S. Halliday re [ECF] 40 Order on Motion to Amend Complaint." Although there is no accompanying motion, Plaintiff—in his Reply Brief—supplied the Court with proposed orders regarding both the Motion to Dismiss and what he refers to as a "Motion for Leave to Amend" (ECF Nos. 46-1, 46-2). On page one of Plaintiff's SAC, he references the fact that this filing is in response to Judge Miller's denial without prejudice of his Motion to Amend Complaint. Further, in a footnote in his Reply Brief, Plaintiff wrote "To the extent necessary, by this Reply, [Plaintiff] renews his Motion for Leave to Amend the Complaint by the Revised Proposed Second Amended Complaint." (ECF No. 46 at 4 n.2). The Court is thus on sufficient notice as to the relief sought by Plaintiff.

3 Only those facts relevant to the instant motions are provided.

4 District courts of the United States "shall have original jurisdiction ... of [a]ny civil case of admiralty or maritime jurisdiction ...." 28 U.S.C. § 1333(1); *see Piché v. Stockdale Holdings, LLC*, Civ. No. 2006-79, 2009 WL 799659, at *2 (D.V.I. Mar. 24, 2009) ("A claim falls within this Court's admiralty jurisdiction if it satisfies two elements: location and connection.") (citing *Jerome B. Grubart, Inc. v. Great Lakes Dredge Dock Co.*, 513 U.S. 527, 534 (1995)). "Since the insurance policy here sued on is a maritime contract[,] the Admiralty Clause of the Constitution brings it within federal jurisdiction." *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 313 (1955). Accordingly, this Court has subject matter jurisdiction over this matter pursuant to 48 U.S.C. § 1612(a), which provides the District Court of the Virgin Islands with the same "jurisdiction of a District Court of the United States." Further, "admiralty law applies to the entire case, not just the claim conferring admiralty jurisdiction." *Dadgostar v. St. Croix Fin. Ctr.*, Civ. No. 1:10-cv-00028, 2011 WL 4383424, at *4 (D.V.I. Sept. 20, 2011) (citing *Roco Carriers, Ltd. v. MIV Nurnberg Exp.*, 899 F.2d 1292, 1296-97 (2d Cir. 1990)).

5 Neither party provided a copy of the Adjustment Contract.

6 The Virgin Islands Supreme Court has established that " 'the foundational elements of negligence' are: '(1) a legal duty of care to the plaintiff, (2) a breach of that duty of care by the defendant (3) constituting the factual and legal cause of (4) damages to the plaintiff.' " *Coastal Air Transp. v. Royer*, 64 V.I. 645, 651 (V.I. 2016) (quoting *Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 380 (V.I. 2014)). To state a claim for gross negligence, a plaintiff must establish the following elements: "1) the defendant owed plaintiff a legal duty of care; 2) the defendant breached that duty in such a way as to demonstrate a wanton, reckless indifference to the risk of injury to the plaintiff; 3) and defendant's breach constituted the proximate cause of 4) damages to plaintiff." *Brathwaite v.* Xavier, S. Ct. Civ. No. 2017-0037, 2019 WL 3287069, at *11 (V.I. July 16, 2019). The distinction between ordinary negligence and gross negligence in this case might appear to be not all that significant, given that both theories require a plaintiff to demonstrate the existence of a legal duty on the part of the adjuster, but as will be explained *infra*, that duty is not necessarily the same under each theory.

7 For a more comprehensive discussion of the policy reasons that state courts have cited when rejecting the existence of an adjuster's duty to the claimant, s*ee* Steven Plitt & Ryan Sandstrom, *Evaluating the Relationship Between Independent Insurance Adjusters and Insureds: The Case Against Imposing an Independent Duty of Care*, 48 Creighton L. Rev. 245, 261 (2015) ("Courts have identified five principal reasons for rejecting an independent tort: (A) lack of contractual privity; (B) general public policy considerations; (C) imposing an independent duty would create conflicting loyalties; (D) the adjuster is controlled by the insurance company; and (E) the cost of imposing a duty outweighs the benefits.").

8 At first glance, *Benjamin* seems to carry more weight, because it is more recent, more specific, and, perhaps, even a little more on point. Though a one-word affirmance in an unpublished court of appeals opinion hardly makes *Benjamin* a binding precedent, it nonetheless cannot be entirely ignored that, unlike *Francis*, *Benjamin* has been subject to appellate review—at least from what the Court has gathered.

One of the factors giving the Court some hesitation in affording more weight to *Benjamin* is that it is not a pronouncement of a local Virgin Islands court but rather a pronouncement by *this Court* as to what the *local* law of the Virgin Islands must

have been at that time. By 1991, when *Francis* was decided, the Legislature enacted a statute divesting this Court of original jurisdiction. *See, e.g., Parrott v. Gov't of the Virgin Islands*, 230 F.3d 615, 619 (3d Cir. 2000). The jurisdiction of this Court then became "equivalent, at least in the civil context, to that of a United States District Court." *Club Comanche, Inc. v. Government of the Virgin Islands*, 278 F.3d 250, 256 (3d Cir. 2002). Consequently, the Territorial Court could have—at least in theory—addressed questions regarding local Virgin Islands law that this Court may never have had the opportunity to do—at least not as a trial court.

Furthermore, *Benjamin* was decided by this Court pursuant to its diversity jurisdiction rather than its appellate jurisdiction. *See Benjamin*, 2002 WL 31573004, at *1. The distinction may be subtle, yet it is important for purposes of comity and appropriate recognition of local precedent. The *Benjamin* decision would not have been binding on the Territorial Court—or even this Court—at that time. Like the *Benjamin* Court, this Court is a federal district court addressing a territorial common law issue under this Court's diversity jurisdiction. The fact that the *Benjamin* Court was applying local law and did not even attempt to distinguish *Francis* makes its conclusions even more suspect, even if they might ultimately be correct. For purposes of comity, it could be the case that *Benjamin* is no more relevant to this case than is *Francis.*

9 *See also* PROSSER & KEETON ON TORTS, § 34, at 211 ("[T]he idea of degrees of negligence, or at least of some kind of aggravated negligence which will result in liability where ordinary negligence will not, has been adopted in a number of *judicial opinions* and statutes.") (emphasis added).

10 For an excellent opinion echoing some of Professor Stempel's concerns, the Court also takes notice of a recent Iowa Supreme Court case addressing a slightly different question than the one before the Court today. In *De Dios v. Indem. Ins. Co. of N. Am.*, 927 N.W.2d 611, 635 (Iowa May 10, 2019), the court concluded that Iowa law did not recognize a claim of bad faith against a third-party claims administrator in a workers' compensation case. However, Justice Brent Appel's dissent provided great insight as to the economic realities of the insurance process that exists today:

> Another factor that drives me toward the conclusion that the tort of bad faith liability for insurance intermediaries should be recognized is the perverse incentives that can arise from the relationship between the insurer and the intermediary. The insurance company hires an intermediary to save money, of course. The intermediary will desire to maintain or strengthen its business, and that can be done by limiting claims payouts. Further, in order to be competitive, the insurance intermediary may resist proper claims handling and instead choose to arbitrarily limit its staff, thereby encouraging shortcuts in the claims process. Further, through use of a third-party intermediary, an insurer may maintain a warm public relations posture while intentionally employing a third-party administrator with the expectation that its agent will limit payouts through whatever means the agent might consider effective. These risks are further enhanced when compensation arrangements contain incentives that increase payouts as claims liability lessens. The interests of the insured do not figure into the financial equation, or at least not in a positive way.

Id. at 633.

Ultimately, Justice Appel concluded that limitations on adjuster liability generate unsound public policy and diminish the overall quality of the insurance claims process:

> In conclusion, one of the features of life in the 21st century is the increased bureaucratization and compartmentalization of business practices that, if accepted as legal barriers, tend to prevent direct accountability for wrongful conduct. Layers upon layers of bureaucracy impair responsiveness.
>
> ...
>
> But where there is no direct accountability, service may deteriorate. We all know the potential scenario. The phone rings and no one answers. One is put on hold for hours. The right hand knows not what the left hand is doing. No one is familiar with the file. A person with decision-making authority cannot be found. Delay. Delay. Delay. This type of behavior could lead to bad-faith exposure of an insurance company.
>
> ...
>
> I can think of no other area where it is more critical to have direct accountability than in insurance—where issues of extraordinary importance and urgency to the insured are increasingly handled by faceless and insulated third-party bureaucracies. To me, one of the essential functions of our tort system is to ensure that parties responsible for the foreseeable injuries that they cause through their misconduct, particularly those done in bad faith, are held directly accountable.

Id. at 635.

11 *See* Stempel, 15 Conn. Ins. L.J. 599, 669 ("[U]nder the (admittedly rare) right set of circumstances, the adjuster might logically be held liable for *tortuous conduct outside of the terms of the insurance policy*, just as many jurisdictions permit recovery for bad faith treatment even when coverage did not exist or was doubtful.") (emphasis added). *See also* PROSSER & KEETON ON TORTS § 70, at 505-06.

12 Plaintiff labeled this Count as Count VII in his SAC, but because he provided two Count VI's, the Court will refer to this Count as Count VIII.

13 A further *Banks* analysis on this Count might be required, but for now the Court sees it prudent to allow Plaintiff to make this amendment. As Plaintiff points out, unlike in *Benjamin*, where the Court "appears not to have considered a third-party beneficiary claim in evaluating the claim that the adjuster breached its duty of good faith and fair dealing," here "the third-party beneficiary claims have been expressly pled...[o]n the current record, it cannot be said that the agreements between Carrier and Wager preclude the Insured's claim to be an intended third-part beneficiary of those agreements." (ECF No. 55 at 3-4). The Adjustment Contract might ultimately reveal that Plaintiff is not an intended third-party beneficiary, but in the absence of any language confirming as much, the Court can only rely on basic assumptions as to what that agreement *might* contain.

End of Document

Applicant Details

First Name	**Evan**
Last Name	**Brown**
Citizenship Status	**U. S. Citizen**
Email Address	**ebrown4@law.gwu.edu**
Address	**Address** **Street** **880 N Pollard St #821** **City** **Arlington** **State/Territory** **Virginia** **Zip** **22203** **Country** **United States**
Contact Phone Number	**3176271031**

Applicant Education

BA/BS From	**Indiana University-Bloomington**
Date of BA/BS	**May 2019**
JD/LLB From	**The George Washington University Law School** **https://www.law.gwu.edu/**
Date of JD/LLB	**May 1, 2022**
Class Rank	**25%**
Law Review/Journal	**Yes**
Journal(s)	**Journal of Energy and Environmental law**
Moot Court Experience	**Yes**
Moot Court Name(s)	**George Washington Law School Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Dixon, Chelsea
dixon.chelsea@epa.gov
Sorscher, Sarah
ssorscher@cspinet.org
202-777-8397
Doster, Kathleen
doster.kathleen@epa.gov

References

Chelsea E. Dixon, Attorney-Advisor
Federal Facilities Enforcement Office
U.S. Environmental Protection Agency
WJC South 2213C
1200 Pennsylvania Ave., NW (MC 2261A)
Washington, DC 20460
Office: (202) 564-2592
Mobile: (202) 794-0730

Kathleen Doster
Attorney-Advisor
U.S. Environmental Protection Agency
Federal Facilities Enforcement Office
1200 Pennsylvania Ave., N.W., MC 2261A
Washington, D.C. 20460
(202) 564-2573
(202) 564-0644(fax)

Sarah Sorscher
Deputy Director of Regulatory Affairs
Center for Science in the Public Interest
1220 L Street NW, Suite 300
Washington, DC 20005

202-777-8397
ssorscher@cspinet.org

Jeffrey Manns
jmanns@law.gwu.edu
George Washington University Law School
2000 H St NW, Washington, DC 20052

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Evan Brown
J.D. Candidate for May 2022
George Washington University Law School

Ebrown4@law.gwu.edu (317) 627-1031

Judge Elizabeth W. Hanes, U.S. District Court for the Eastern District of Virginia
Clerkship August 2022 – August 2024

Dear Judge Hanes,

My name is Evan Brown, and my career goal is to work as a federal attorney with the Department of Justice. I am applying for this position because I am a local student at nearby George Washington University and clerking your chambers would provide an unmatched opportunity to increase my knowledge of the law and legal procedure, understand how courts reach decisions, and ultimately develop into a superior advocate in a fast-paced litigation environment.

I have litigation experience that will enable me to quickly bring high-caliber assistance to your chambers. As a law clerk for the Department of Justice's National Courts Section, I assist attorneys with time-sensitive motions by researching and drafting memorandum on a variety of legal issues in government contract claims including standing, the admissibility of expert testimony, and APA review. I write preliminary drafts of motions, edit attorneys' final work, summarize opposing parties' motions, and check to make sure the holdings of cited authority square with the cited language. Finally, I attend status conferences and hearings and have become familiar with courtroom practice. I will also have clerked at EPA's Office of Enforcement and Compliance Assurance for two semesters by the time I graduate.

I am passionate about public interest litigation because I find answering legal questions intellectually challenging and serving the common good rewarding. I believe the text of the law should be the lodestar of proper jurisprudence. In the George Washington University First Year Student Moot Court Competition, I wrote the top-scoring brief using statutory construction and legislative history to argue against a finding of "recognized stature" under the Visual Artists Rights Act. At the Center for Science in the Public Interest, I drafted a citizens petition using text-based arguments urging FDA to adopt regulations under its "adulteration" authority to protect consumers from poppy seed products contaminated with opiates from the poppy plant.

As a writer, I am adept at making cogent legal arguments, synthesizing primary law, and writing airtight factual statements. As a member of the George Washington Journal of Energy and Environmental Law (JEEL), I have extensive experience editing legal writing and using Bluebook citations. My writing philosophy is reader-centric and problem-solving oriented. In addition, my attention to detail will ensure orders and decisions are well-supported by facts in the record.

As a researcher, I expeditiously master unfamiliar areas of the law. While writing my student Note for JEEL on tax credits, I used a variety of databases to research congressional reports, public laws, and legislative histories. My research process includes clarifying (and often revisiting) the question presented, orienting myself with treatises and other secondary sources, breaking down alternative readings of the statutory and/or regulatory text, and couching the fact pattern between similar cases.

My passion, writing, and research skills make me a well-qualified candidate for a clerkship with your chambers. I appreciate you taking the time to consider me for this position, and I look forward to your decision.

Thanks,

Evan Brown

Evan Brown

Ebrown4@law.gwu.edu

Address:
880 N Pollard St, #821
Arlington, VA 22203

EDUCATION

George Washington University Law School, Washington, DC
Candidate for J.D., May 2022
GPA: 3.64/4.00, Thurgood Marshall Scholar (Top 25%)
Activities: Moot Court Board, Journal of Energy and Environmental Law, Alternative Dispute Resolution Board

Indiana University, Bloomington, IN
BS in Business
GPA: 3.94, Kelley School of Business Graduate with Highest Distinction
Awards: Presidential Scholar (Top 1%), Hutton Honors Scholar, Provost Scholar

EXPERIENCE

U.S. Dept of Justice, National Courts Section, Washington, DC
Law Clerk, May 2021 – Present
- Conserves the public fisc by defending government in legally deficient claims for contract damages
- Researches case law to draft pre-trial motions on admissibility of expert testimony
- Drafts memorandum to support government counterclaims for fraud
- Liaises with federal agencies to compile administrative record in bid protests
- Attends status conferences and hearings before the Court of Federal Claims

U.S. EPA Federal Facilities Enforcement Office, Washington, DC
Law Clerk, January 2021 – April 2021; September – December 2021 (exp.)
- Researched intersection between EPA and federal housing law to inform office's environmental justice efforts
- Analyzed RCRA inspection report to draft memo answering whether agency had reasonable grounds to cite waste facility for a finding of significant noncompliance
- Identified bottlenecks in CERCLA dispute process to expedite Superfund cleanup process
- Attended training on EPA Part 22 requirements for enforcement actions

Center for Science in the Public Interest, Washington, DC
Regulatory Policy Intern, August 2020 – December 2020
- Drafted enforcement letter to FDA requesting enforcement of the agency's fortification policy under its "misbranding" rules against alcohol manufacturers
- Researched FD&C Act, case law, and scientific literature to draft citizens petition to FDA urging the agency to promulgate rules for a maximum level of opiate contamination in poppy products under its "adulteration" authority

Brown Law Office, San Diego, CA
Law Clerk, May 2020– August 2020
- Researched Indiana Administrative Orders and Procedures Act to draft petition for judicial review of agency final order suspending client's license
- Analyzed evidentiary records, including medical files and affidavits, and researched Indiana's Medical Malpractice Act to draft plaintiff's submission to medical review panel alleging physician's failure to obtain informed consent
- Drafted requests for production and motions to compel in discovery proceedings

George Washington University Law School, Washington, DC
Research Assistant, May 2020– December 2020
- Researched agency use of cost-benefit analysis in rulemaking to draft research report on whether supervising professor's legislative proposal satisfies separation of powers principles

Official Academic Transcript from:
THE GEORGE WASHINGTON UNIVERSITY
OFFICE OF THE REGISTRAR
800 21ST STREET NW
WASHINGTON, DC 20052

TELEPHONE: 202-994-4900

Official Academic Transcript of:
EVAN M BROWN
Transcript Created: 24-May-2021

Requested by:
EVAN M BROWN
880 N POLLARD ST
821
ARLINGTON, VA 22203-1749

E-Mail: evanmbrown@gwu.edu

Document Type: THIRD-PARTY SECURE PDF

Intended Recipient:
EVAN BROWN
880 N POLLARD ST
821
ARLINGTON, VA 22203-1749

E-Mail: evanmbrown@gwu.edu

Delivered by:
Parchment, LLC
Under Contract To:
THE GEORGE WASHINGTON UNIVERSITY
Order Number: 1EZ709163- 1
Telephone: (847) 716-3005

Statement of Authenticity
This Official Academic Transcript in Portable Document Format (PDF) was requested by the individual identified above in compliance with the provisions of the Family Educational Rights and Privacy Act of 1974 as Amended and in conformance with the prescribed ordering procedures of The George Washington University who has contracted with Parchment, LLC of Scottsdale, AZ for electronic delivery of Official Academic Transcripts in PDF form. You may verify the authenticity of our relationship with The George Washington University by visiting their website at http://registrar.gwu.edu/transcripts.

Colleges and Universities
If you are an accredited post-secondary academic institution, please be advised that you are receiving this transcript as a "Third-Party" receiver. Since you are not registered to our Parchment Receive service, additional security provisions have been added to this document to prevent content copying or alteration. You also are not permitted to print the document without watermark protections or add notations to the document when saving to your student information system. Should you wish to receive future documents through our electronic networks without these additional security features, please register your institution at https://info.parchment.com/compare_receive.html.

Privacy and Other Information
This Official Academic Transcript is for delivery to the above-named "Intended Recipient". If you are not the "Intended Recipient", please notify the Office of the Registrar at The George Washington University. You are not permitted to copy or alter this document. You may not forward this document or disclose its contents to any person or organization other than the "Intended Recipient" without the express written permission of the student. If this document is copied or printed, the words "PRINTED COPY" will appear in the replicated transcript image.

In the interest of security and privacy, we delete this Official Academic Transcript from our server 48 hours after it is initially downloaded excluding weekends and holidays. If a replacement is subsequently needed, the requesting party must order another transcript from The George Washington University. If you have any questions about this document please contact Parchment Customer Service at (847) 716-3005. Our operators are available from 7:00 am to 7:00 pm Monday through Friday (Central Time).

THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

SSN : ***-**-8110
GWid : G33221649
Date of Birth: 02-NOV

Date Issued: 24-MAY-2021

Record of: Evan M Brown

Page: 1

Student Level: Law
Admit Term: Fall 2019
Current College(s):Law School
Current Major(s): Law

Issued To: EVAN BROWN
880 N POLLARD ST
821
ARLINGTON, VA 22203-1749

REFNUM:51925775

GEORGE WASHINGTON UNIVERSITY CREDIT:

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2019			
Law School			
Law			
LAW 6202	Contracts Swaine	4.00	B+
LAW 6206	Torts Suter	4.00	A
LAW 6212	Civil Procedure Gutman	4.00	A-
LAW 6216	Fundamentals Of Lawyering I Gullman	3.00	B-
Ehrs 15.00 GPA-Hrs 15.00 GPA 3.467			
CUM 15.00 GPA-Hrs 15.00 GPA 3.467			
Spring 2020			
Law School			
Law			
LAW 6208	Property Tuttle	4.00	CR
LAW 6209	Legislation And Regulation Schaffner	3.00	CR
LAW 6210	Criminal Law Weisburd	3.00	CR
LAW 6214	Constitutional Law I Morrison	3.00	CR
LAW 6217	Fundamentals Of Lawyering II Gullman	3.00	CR
Ehrs 16.00 GPA-Hrs 0.00 GPA 0.000			
CUM 31.00 GPA-Hrs 15.00 GPA 3.467			
Good Standing			
...			
DURING THE SPRING 2020 SEMESTER, A GLOBAL PANDEMIC CAUSED BY COVID-19 RESULTED IN SIGNIFICANT ACADEMIC DISRUPTION. ALL LAW SCHOOL COURSES FOR SPRING 2020 SEMESTER WERE GRADED ON A MANDATORY CREDIT/NO-CREDIT BASIS.			

********** CONTINUED ON NEXT COLUMN **********

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2020			
Law School			
Law			
LAW 6250	Corporations Cunningham	4.00	B+
LAW 6400	Administrative Law Siegel	3.00	A-
LAW 6434	Water Pollution Control Downing	2.00	A-
LAW 6641	External Comp - Moot Court Johnson	1.00	CR
LAW 6656	Independent Legal Writing	2.00	A+
LAW 6668	Field Placement	1.00	CR
LAW 6670	Public Interest Lawyering Angel	2.00	B
Ehrs 15.00 GPA-Hrs 13.00 GPA 3.564			
CUM 46.00 GPA-Hrs 28.00 GPA 3.512			
Good Standing			
Spring 2021			
LAW 6230	Evidence Braman	3.00	A
LAW 6238	Remedies Trangsrud	3.00	A
LAW 6380	Constitutional Law II	4.00	A
LAW 6667	Advanced Field Placement Brown	0.00	CR
Ehrs 10.00 GPA-Hrs 10.00 GPA 4.000			
CUM 56.00 GPA-Hrs 38.00 GPA 3.640			
Fall 2020			
Law School			
Law			
LAW 6657	Energy & Environ Law Jrnl Note	1.00	----------
Credits In Progress:		1.00	
Spring 2021			
LAW 6657	Energy & Environ Law Jrnl Note	1.00	----------
LAW 6668	Field Placement	3.00	----------
Credits In Progress:		4.00	

********** CONTINUED ON PAGE 2 **********

University Registrar

THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

SSN : ***-**-8110
GWid : G33221649
Date of Birth: 02-NOV

Date Issued: 24-MAY-2021

Record of: Evan M Brown

Page: 2

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2021			
LAW 6218	Prof Responsibility & Ethics	2.00	----------
LAW 6232	Federal Courts	3.00	----------
LAW 6240	Litigation W/ Fed Govt.	2.00	----------
LAW 6644	Moot Court-Van Vleck	1.00	----------
LAW 6652	Legal Drafting	2.00	----------
	Credits In Progress:	10.00	

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	56.00	38.00	138.33	3.640
OVERALL	56.00	38.00	138.33	3.640

########## END OF DOCUMENT ##########

University Registrar

Office of the Registrar
THE GEORGE WASHINGTON UNIVERSITY
Washington, DC 20052

NOTICE TO RECIPIENT

Federal legislation (the Family Educational Rights and Privacy Act) requires institutions of higher education to inform each recipient of this academic record that it is to be used only for the purpose for which it was presented and that it is not to be copied or made available to a third party without the express permission of the individual concerned. It must be pointed out in this context that as a general practice, mutually agreed upon by professional associations, such records are not to be reproduced for distribution beyond the purview of the recipient or his/her organization.

DESIGNATION OF CREDIT

All courses are taught in semester hours.

TRANSFER CREDIT

Transfer courses listed on your transcript are bonafide courses and are assigned as advanced standing. However, whether or not these courses fulfill degree requirements is determined by individual school criteria. The notation of TR indicates credit accepted from a postsecondary institution or awarded by AP/IB exam.

EXPLANATION OF COURSE NUMBERING SYSTEM

All colleges and schools beginning Fall 2010 semester:

1000 to 1999	Primarily introductory undergraduate courses.
2000 to 4999	Advanced undergraduate courses that can also be taken for graduate credit with permission and additional work.
5000 to 5999	Special courses or part of special programs available to all students as part of ongoing curriculum innovation.
6000 to 6999	For master's, doctoral, and professional-level students; open to advanced undergraduate students with approval of the instructors and the dean or advising office.
8000 to 8999	For master's, doctoral, and professional-level students.

All colleges and schools except the Law School, the School of Medicine and Health Sciences, and the School of Public Health and Health Services before Fall 2010 semester:

001 to 100	Designed for freshman and sophomore students. Open to juniors and seniors with approval. Used by graduate students to make up undergraduate prerequisites. Not for graduate credit.
101 to 200	Designed for junior and senior students. With appropriate approval, specified courses may be taken for graduate credit by completing additional work.
201 to 300	Primarily for graduate students. Open to qualified seniors with approval of instructor and department chair. In School of Business, open only to seniors with a GPA of 3.00 or better as well as approval of department chair and dean.
301 to 400	Graduate School of Education and Human Development, School of Engineering and Applied Science, and Elliott School of International Affairs – Designed primarily for graduate students. Columbian College of Arts and Sciences – Limited to graduate students, primarily for doctoral students. School of Business – Limited to doctoral students.
700s	The 700 series is an ongoing program of curriculum innovation. The series includes courses taught by distinguished University Professors.
801	This number designates Dean's Seminar courses.

The Law School

Before June 1, 1968:

100 to 200	Required courses for first-year students.
201 to 300	Required and elective courses for Bachelor of Laws or Juris Doctor curriculum. Open to master's candidates with approval.
301 to 400	Advanced courses. Primarily for master's candidates. Open to LL.B or J.D. candidates with approval.

After June 1, 1968 through Summer 2010 semester:

201 to 299	Required courses for J.D. candidates.
300 to 499	Designed for second- and third-year J.D. candidates. Open to master's candidates only with special permission.
500 to 850	Designed for advanced law degree students. Open to J.D. candidates only with special permission.

School of Medicine and Health Sciences and
School of Public Health and Health Services before Fall 2010 semester:

001 to 200	Designed for students in undergraduate programs.
201 to 800	Designed for M.D., health sciences, public health, health services, exercise science and other graduate degree candidates in the basic sciences.

CORCORAN COLLEGE OF ART + DESIGN

The George Washington University merged with the Corcoran College of Art + Design, effective August 21, 2014. For the pre-merger Corcoran transcript key, please visit http://go.gwu.edu/corcorantranscriptkey

THE CONSORTIUM OF UNIVERSITIES OF THE WASHINGTON METROPOLITAN AREA

Courses taken through the Consortium are recorded using the visited institutions' department symbol and course number in the first positions of the title field. The visited institution is denoted with one of the following GW abbreviations.

AU	American University	MMU	Marymount University
CORC	Corcoran College of Art & Design	MV	Mount Vernon College
		NVCC	Northern Virginia Community College
CU	Catholic University of America	PGCC	Prince George's Community College
GC	Gallaudet University	SEU	Southeastern University
GU	Georgetown University	TC	Trinity Washington University
GL	Georgetown Law Center	USU	Uniformed Services University of the Health Sciences
GMU	George Mason University		
HU	Howard University	UDC	University of the District of Columbia
MC	Montgomery College	UMD	University of Maryland

GRADING SYSTEMS

Undergraduate Grading System

A, Excellent; *B,* Good; *C,* Satisfactory; *D,* Low Pass; *F,* Fail; *I,* Incomplete; *IPG,* In Progress; *W,* Authorized Withdrawal; *Z,* Unauthorized Withdrawal; *P,* Pass; *NP,* No Pass; *AU,* Audit. When a grade is assigned to a course that was originally assigned a grade of *I,* the *I* is replaced by the final grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.
Effective Fall 2011: The grading symbol RP indicates the class was repeated under Academic Forgiveness.
Effective Fall 2003: The grading symbol R indicates need to repeat course.
Prior to Summer 1992: When a grade is assigned to a course that was originally assigned a grade of *I,* the grade is replaced with *I/* and the grade.
Effective Fall 1987: The following grading symbols were added*: A-, B+, B-, C+, C-, D+, D-.*
Effective Summer 1980: The grading symbols: *P,* Pass, and *NP,* No Pass, replace *CR,* Credit, and *NC,* No Credit.

Graduate Grading System

(Excludes Law and M.D. programs.) *A,* Excellent; *B,* Good; *C,* Minimum Pass; *F,* Failure; *I,* Incomplete; *IPG,* In Progress; *CR,* Credit; *W,* Authorized Withdrawal; *Z,* Unauthorized Withdrawal; *AU,* Audit. When a grade is assigned to a course that was originally assigned a grade of *I,* the grade is replaced with *I* and the grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.
Effective Fall 1994: The following grading symbols were added: *A-, B+, B-, C+, C-* grades on the graduate level.

Law Grading System

A+, A, A-, Excellent; *B+, B, B-,* Good; *C+, C, C-,* Passing; *D,* Minimum Pass; *F,* Failure; *CR,* Credit; *NC,* No Credit; *I,* Incomplete. When a grade is assigned to a course that was originally assigned a grade of *I,* the grade is replaced with *I* and the grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.

M.D. Program Grading System

H, Honors; *HP,* High Pass; *P,* Pass; *F,* Failure; *IP,* In Progress; *I,* Incomplete; *CN,* Conditional; *W,* Withdrawal; *X,* Exempt, *CN/P,* Conditional converted to Pass; *CN/F,* Conditional converted to Failure. Through Summer 2014 the *I* was replaced with *I* and the final grade.

For historical information not included in the transcript key, please visit http://www.gwu.edu/transcriptkey

INDIANA UNIVERSITY

Bloomington

Official Transcript

Page 1

Statement of Authenticity

This transcript was requested, following all applicable state and federal laws, and is the official transcript of the student identified below. The transcript has been transmitted electronically to the recipient identified below and is only intended for that recipient. If you are not the intended recipient, please notify the Transcript Office at Indiana University, (812) 855-4500. It is not permissible to replicate this transcript or forward it to any person or organization other than the identified recipient.

If this transcript has been issued by Indiana University and no change(s) have been made, the recipient will view a "Certification Valid" message confirming the digital signature from the university that authorizes the release of this transcript. If "Certification Valid" was not displayed, the following transcript has either been altered or not issued by Indiana University. The electronic signature at the bottom of this page provides the credentials for the issuing authority.

Recipient:

Evan

ebrown4@law.gwu.edu

Student:

Evan Brown

The official transcript explanation is included in this document.

INDIANA UNIVERSITY
BLOOMINGTON

Indiana University Transcripts
Bloomington, IN 47405
PHONE: (812) 855-4500
transcripts@iu.edu
http://transcripts.iu.edu

How to Authenticate This Official Transcript from Indiana University

This official transcript has been transmitted electronically to the recipient, and is intended solely for use by that recipient. If you are not the intended recipient, please notify the Transcript Office at Indiana University, (812) 855-4500. It is not permissible to replicate this transcript or forward it to any person or organization other than the identified recipient. Release of this record or disclosure of its contents to any third party without written consent of the record owner is prohibited.

This official transcript has been digitally signed and therefore contains special security characteristics. If this transcript has been issued by Indiana University Bloomington and this transcript is viewed using Adobe® Acrobat version 6.0 or greater or Adobe® Reader version 6.04 or greater, it will reveal a digital certificate that has been applied to the transcript. This digital certificate will appear in a pop-up screen or status bar on the transcript, display a blue ribbon, and declare that the transcript was certified by Indiana University Bloomington with a valid certificate issued by GeoTrust CA for Adobe®. This transcript certification can be validated by clicking on the Signature Properties of the transcript.

The blue ribbon symbol is your assurance that the digital certificate is valid, the transcript is authentic, and the contents of the transcript have not been altered.

If the transcript does not display a valid certification and signature message, reject this transcript immediately. An invalid digital certificate display means either the digital certificate is not authentic, or the transcript has been altered. The digital certificate can also be revoked by the Office of the Registrar if there is cause, and digital certificates can expire. A transcript with an invalid digital certificate display should be rejected.

Lastly, one other possible message, Author Unknown, can have two possible meanings: first, the certificate is a self-signed certificate or has been issued by an unknown or untrusted certificate authority. Second, the revocation check could not be completed. If you receive this message, make sure you are properly connected to the internet. If you have an internet connection and you still cannot validate the digital certificate online, reject this transcript.

The official transcript explanation is the last page of this document.

The current version of Adobe® Reader is free of charge and available for immediate download at http://www.adobe.com.

If you require further information regarding the authenticity of this transcript, you may e-mail or call the Transcript Office at transcripts@iu.edu or (812) 855-4500.

INDIANA UNIVERSITY
OFFICE OF THE REGISTRAR

Official Transcript

Name : Brown,Evan
Student ID : 0003169951
Address : 6214 Broadway St
Indianapolis, IN 46220-1837
United States

SSN : XXX-XX-8110
Birthdate : 11-02-XXXX
Print Date : 02-14-2020
Request Nbr : 027094326

- - - - - Degrees Awarded - - - - -

Indiana University Degree
Indiana University Bloomington
Kelley School of Business
Bachelor of Science in Business
With Highest Distinction
Hutton Honors College Program Completed
Major: Marketing
Minor: Psychology
05-04-2019

- - - - - Beginning of Undergraduate Record - - - - -

Fall 2012 Bloomington

Program : University Div Ugrd Nondeg

Course		Title	Hrs	Grd
CHEM-C	105	PRINCIPLES OF CHEMISTRY I	3.00	A
CHEM-C	125	EXPERIMENTAL CHEMISTRY I	2.00	A
HIST-H	105	AMERICAN HISTORY I	3.00	A

Semester:	IU GPA Hours:	8.00	GPA Points:	32.000
	Hours Earned:	8.00	GPA:	4.000
Cumulative:	IU GPA Hours:	8.00	GPA Points:	32.000
	Hours Earned:	8.00	GPA:	4.000

Spring 2013 Bloomington

Program : University Div Ugrd Nondeg

Course		Title	Hrs	Grd
HIST-H	106	AMERICAN HISTORY II	3.00	A

Semester:	IU GPA Hours:	3.00	GPA Points:	12.000
	Hours Earned:	3.00	GPA:	4.000
Cumulative:	IU GPA Hours:	11.00	GPA Points:	44.000
	Hours Earned:	11.00	GPA:	4.000

Fall 2013 Bloomington

Program : University Div Ugrd Nondeg
Program : University Div Ugrd Nondeg

Course		Title	Hrs	Grd
MATH-M	211	CALCULUS I	4.00	A

Semester:	IU GPA Hours:	4.00	GPA Points:	16.000
	Hours Earned:	4.00	GPA:	4.000
Cumulative:	IU GPA Hours:	15.00	GPA Points:	60.000
	Hours Earned:	15.00	GPA:	4.000

--- Record continued in next column ---

Fall 2014 Bloomington

Program : University Div Ugrd Nondeg

Course		Title	Hrs	Grd
POLS-Y	103	INTRO TO AMERICAN POLITICS	3.00	A

Semester:	IU GPA Hours:	3.00	GPA Points:	12.000
	Hours Earned:	3.00	GPA:	4.000
Cumulative:	IU GPA Hours:	18.00	GPA Points:	72.000
	Hours Earned:	18.00	GPA:	4.000

Fall 2015 Bloomington

Program : Business Undergraduate

Course		Title	Hrs	Grd
BUS-K	204	THE COMPUTER IN BUS: HONORS	3.00	A
BUS-T	175	COMPASS I	1.50	A
BUS-X	170	HOW BUSINESS WORKS	3.00	A
MATH-M	118	FINITE MATHEMATICS	3.00	A
SPH-K	150	INTRO TO KINE AND PH	3.00	A

Test Credit Applied Toward University Div Pre-Business Program Bloomington

Course		Title	Hrs	Grd
ENG-L	198	FRESHMAN LITERATURE	3.00	T
ENG-W	131EX	SEM 1 ENG COMPOSITION BY EXAM	0.00	T
ENG-W	131EX	SEM 1 ENG COMPOSITION BY EXAM	0.00	T
ENG-W	131EX	SEM 1 ENG COMPOSITION BY EXAM	0.00	T
ENG-W	131EX	SEM 1 ENG COMPOSITION BY EXAM	0.00	T
ENG-W	131EX	SEM 1 ENG COMPOSITION BY EXAM	0.00	T
HIST-H	103	EUROPE:RENAISSANCE TO NAPOLEON	3.00	T
HIST-H	104	EUROPE: NAPOLEON TO THE PRES	3.00	T
HIST-H	105	AMERICAN HISTORY I	3.00	T
HIST-H	106	AMERICAN HISTORY II	3.00	T
HIST-W	100	ISSUES IN WORLD HISTORY	3.00	T
MATH-M	199EX	MATH FUNDAMENTAL SKILL BY EXAM	0.00	T
MATH-M	199EX	MATH FUNDAMENTAL SKILL BY EXAM	0.00	T
MATH-M	211	CALCULUS I	4.00	T
MATH-M	211	CALCULUS I	4.00	T
MATH-M	212	CALCULUS II	4.00	T

--- Record continued on next page ---

Send To:
Evan
Evan Brown

Mark McConahay
Registrar

INDIANA UNIVERSITY
OFFICE OF THE REGISTRAR

Official Transcript

Name : Brown,Evan
Student ID : 0003169951
Address : 6214 Broadway St
Indianapolis, IN 46220-1837
United States

SSN : XXX-XX-8110
Birthdate : 11-02-XXXX
Print Date : 02-14-2020
Request Nbr : 027094326

PHYS-UN	100	PHYS UNDISTRIBUTED-100 LEVEL	3.00 T

Test Credit Hrs: 33.00

Test Credit Applied Toward Business Undergraduate Program
Bloomington

Course		Title	Hrs Grd
BIOL-E	112	BASIC BIOL BY EXAMINATION II	3.00 T
BIOL-L	111	FNDTNS OF BIOL:DIVRS,EVOL,ECOL	4.00 T
BIOL-L	112	FNDTNS OF BIOL:BIOL MECHANISMS	4.00 T
CMLT-C	205	COMPARATIVE LITERARY ANALYSIS	4.00 T
ENG-W	131	READING, WRITING, & INQUIRY I	4.00 T
ENG-W	131	READING, WRITING, & INQUIRY I	3.00 T
GEOG-G	110	INTRO TO HUMAN GEOGRAPHY	3.00 T
HIST-H	103	EUROPE:RENAISSANCE TO NAPOLEON	4.00 T
HIST-H	104	EUROPE: NAPOLEON TO THE PRES	4.00 T
POLS-Y	103	INTRO TO AMERICAN POLITICS	3.00 T

Test Credit Hrs: 36.00

Semester:	IU GPA Hours:	13.50	GPA Points:	54.000
	Hours Earned:	82.50	GPA:	4.000
Cumulative:	IU GPA Hours:	31.50	GPA Points:	126.000
	Hours Earned:	100.50	GPA:	4.000

Spring 2016 Bloomington

Program : Business Undergraduate

Course		Title	Hrs Grd
BUS-C	104	BUSINESS PRESENTATIONS	3.00 A
BUS-L	293	HONORS-LEGAL ENVIR OF BUS	3.00 A
ECON-E	201	INTRO TO MICROECONOMICS	3.00 B
STAT-S	301	BUSINESS STATISTICS	3.00 A
BUS-D	270	GLOBAL BUS ENVIRONMENTS	1.50 A-
BUS-A	100	BASIC ACCOUNTING SKILLS	1.00 A

Semester:	IU GPA Hours:	14.50	GPA Points:	54.550
	Hours Earned:	14.50	GPA:	3.762
Cumulative:	IU GPA Hours:	46.00	GPA Points:	180.550
	Hours Earned:	115.00	GPA:	3.925

--- Record continued in next column ---

Fall 2016 Bloomington

Program : Business Undergraduate

Course		Title	Hrs Grd
BUS-A	201	INTRO TO FINANCIAL ACCOUNTING	3.00 A
BUS-C	205	BUSINESS COMMUNICATION-HONORS	3.00 A
BUS-G	202	BUSINESS, GOVERNMENT, AND SOC	2.00 A+
BUS-T	275	KELLEY COMPASS II: ASSOCIATE	1.50 A+
HON-H	233	GRT AUTHORS, COMPSRS,&ARTISTS	3.00 A
		Course Topic(s): WALKING	
BUS-D	271	GLOBAL BUS ANLS-INTER BUS MGMT	1.50 B+
		Course Topic(s): PRIORIIZNG/ENHANC GLBL EXPANSN	

Semester:	IU GPA Hours:	14.00	GPA Points:	54.950
	Hours Earned:	14.00	GPA:	3.925
Cumulative:	IU GPA Hours:	60.00	GPA Points:	235.500
	Hours Earned:	129.00	GPA:	3.925

Spring 2017 Bloomington

Program : Business Undergraduate

Course		Title	Hrs Grd
BUS-A	207	INTRO TO MANAGRL ACCT-HONORS	3.00 A-
BUS-K	303	TECHNOLOGY & BUS ANALYSIS	3.00 A-
ECON-E	202	INTRO TO MACROECONOMICS	3.00 A+
HON-H	211	IDEAS AND EXPERIENCE I	3.00 A+
HON-H	233	GRT AUTHORS, COMPSRS,&ARTISTS	3.00 A
		Course Topic(s): THE VIRTUE OF EMPATHY	
SPH-I	149	JUDO	1.00 A

Semester:	IU GPA Hours:	16.00	GPA Points:	62.200
	Hours Earned:	16.00	GPA:	3.888
Cumulative:	IU GPA Hours:	76.00	GPA Points:	297.700
	Hours Earned:	145.00	GPA:	3.917

Fall 2017 Bloomington

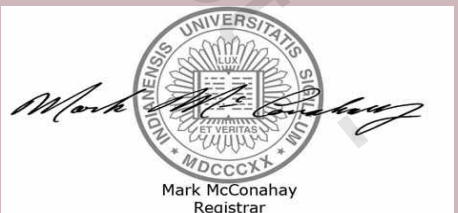
Program : Business Undergraduate

Course		Title	Hrs Grd
BUS-F	370	I-CORE - FINANCE COMPONENT	3.00 A
BUS-M	370	I-CORE - MARKETING COMPONENT	3.00 A-
BUS-P	370	I-CORE - OPERATIONS COMPONENT	3.00 A
BUS-T	375	COMPASS III	1.00 A
BUS-Z	370	I-CORE - LEADERSHIP COMPONENT	3.00 A-
JSTU-X	170	LEADERSHIP IN JEWISH STUDIES	1.00 S
		Course Topic(s): JEWISH COOKING	
BUS-L	375	ETHICS & 21ST CENT BUS LEADER	2.00 A-

Semester:	IU GPA Hours:	15.00	GPA Points:	57.600
	Hours Earned:	16.00	GPA:	3.840
Cumulative:	IU GPA Hours:	91.00	GPA Points:	355.300
	Hours Earned:	161.00	GPA:	3.904

--- Record continued on next page ---

Send To:
Evan
Evan Brown



INDIANA UNIVERSITY
OFFICE OF THE REGISTRAR

Official Transcript

Name	: Brown,Evan	SSN	: XXX-XX-8110
Student ID	: 0003169951	Birthdate	: 11-02-XXXX
Address	: 6214 Broadway St Indianapolis, IN 46220-1837 United States	Print Date Request Nbr	: 02-14-2020 : 027094326

Spring 2018 Bloomington

Program : Business Undergraduate

Course		Title	Hrs	Grd
BUS-M	344	CREATIVITY AND COMMUNICATION	3.00	A
BUS-M	346	ANALYSIS OF MARKETING DATA	3.00	A
BUS-M	405	CONSUMER BEHAVIOR	3.00	A
BUS-M	429	LEGAL ASPECTS OF MARKETING	3.00	A+
PSY-P	155	INTRO TO PSY & BRAIN SCIENCES	3.00	A+

Semester:	IU GPA Hours:	15.00	GPA Points:	60.000
	Hours Earned:	15.00	GPA:	4.000
Cumulative:	IU GPA Hours:	106.00	GPA Points:	415.300
	Hours Earned:	176.00	GPA:	3.918

Fall 2018 Bloomington

Program : Business Undergraduate

Course		Title	Hrs	Grd
BUS-J	375	STRATEGIC MANAGEMENT	3.00	A-
BUS-M	303	MARKETING RESEARCH	3.00	A
BUS-M	432	DIGITAL MARKETING	3.00	A
PSY-P	304	SOC PSYCHOL INDIV DIFFERENCES	3.00	A
PSY-P	323	INDUSTRIAL/ORGANIZATIONAL PSY	3.00	A

Semester:	IU GPA Hours:	15.00	GPA Points:	59.100
	Hours Earned:	15.00	GPA:	3.940
Cumulative:	IU GPA Hours:	121.00	GPA Points:	474.400
	Hours Earned:	191.00	GPA:	3.921

Spring 2019 Bloomington

Program : Business Undergraduate

Course		Title	Hrs	Grd
BUS-M	450	MARKETING STRATEGY	3.00	A-
SOC-S	100	INTRODUCTION TO SOCIOLOGY	3.00	A
SPEA-E	476	ENVIRONMENTAL LAW & REGULATION	3.00	A+
SPH-H	180	STRESS PREVENTION & MANAGEMENT	3.00	A

Semester:	IU GPA Hours:	12.00	GPA Points:	47.100
	Hours Earned:	12.00	GPA:	3.925
Cumulative:	IU GPA Hours:	133.00	GPA Points:	521.500
	Hours Earned:	203.00	GPA:	3.921

Student Undergraduate Program Summary

GPA Hours:	133.00	Transfer/Test Hours Passed:	36.00		
Hours Earned:	170.00	Points:	521.500	GPA:	3.921

Indiana University Undergraduate Summary

IU GPA Hours:	133.00	Transfer/Test Hours Passed:	69.00		
Hours Earned:	203.00	Points:	521.500	GPA:	3.921

Academic Objective as of Last Enrollment

Business Undergraduate
Marketing BSB

--- Record continued in next column ---

Psychology MIN

--- End Of Record ---

Issued at: Indiana University Bloomington
Mark McConahay, Registrar

Send To:
Evan
Evan Brown

INDIANA UNIVERSITY
OFFICE OF THE REGISTRAR
OFFICIAL TRANSCRIPT EXPLANATION

Note: The following explanation reflects information found on the Indiana University **Official Transcript** produced from the Student Information System implemented Fall 2004. A transcript labeled **Official Record** is also an official transcript which has been produced from the prior student record system. While there is no difference in the way grade point averages are calculated in each format, the Official Record (old system) will not reflect as many of the grade point average summaries as are now available on the Official Transcript (current system). *****

I. *Grade and Credit Point System*
The following grades are considered in computing semester or cumulative grade averages. Plus and minus grades are computed in cumulative averages effective First Semester 1977-78. Course hours with a grade of "F" are counted when computing grade point averages but do not count toward the earned hours required for degrees.

A+	(4.0 Pts.)	B+	(3.3 Pts.)	C+	(2.3 Pts.)	D+	(1.3 Pts.)	WF	Withdrawn-Failing (0 Pts.)
A	(4.0 Pts.)	B	(3.0 Pts.)	C	(2.0 Pts.)	D	(1.0 Pts.)		(Discontinued First Semester 1977-78)
A-	(3.7 Pts.)	B-	(2.7 Pts.)	C-	(1.7 Pts.)	D-	(0.7 Pts.)	F	Failing (0 Pts.)

The following grades are not considered in computing semester or cumulative grade point averages:

AU Audit - No credit (Discontinued 1965)
AX through DX (Including plus and minus grades) Denotes a graded course subsequently retaken under the Extended-X Policy (effective Fall 1994) (See Undergraduate GPA exception below)
CF Credited on Certificate (Discontinued 1965)
DF Deferred (Discontinued 1965; Treated as Incomplete)
E Conditional (Discontinued 1965; Treated as Incomplete)
EX Exemption (Discontinued 1965)
FX Denotes a course originally failed and subsequently retaken during or after First Semester 1976-77 under the FX or Extended-X Policy. (See Undergraduate GPA exception below).
I Incomplete (Effective First Semester 1977-78, automatically changed to F after one calendar year; See also grade of R.)
NC No Credit (Established 1971); replaced AUDIT (AU)
NR No Report Submitted by Instructor (Used for unreported grades for prior semesters or course work that has not been graded for the current semester)
NY Used to signify enrollment in a special program for which credit when earned will be shown as an ADDITIONAL entry on the permanent academic record.
O Denotes an Incomplete in a course taught through Purdue University.
P Passed (Pass/Fail Option) (The Pass/Fail Option permits graduate and undergraduate students to enroll in a course and receive a grade of P or F. Pass/Fail Option courses are normally limited to electives. The responsibility of approval, as well as special regulations affecting the Option, rests with the dean of the student's school or division under procedures which the school or division establishes. Instructors are not notified of undergraduate students registering for this Option. A grade of P cannot subsequently be changed to a grade of A, B, C, or D)
R Deferred (Effective First Semester 1977-78, used for course work which can be evaluated only after two or more semesters--such course work was previously graded with I.)
S Satisfactory (entire class graded S or F)
T Denotes credits transferred from another institution.
W Withdrawn--Passing (Prior to Second Semester 1974-75, used to indicate withdrawal while passing. Effective Second Semester 1974-75, used to reflect students who withdraw while passing after the official Drop and Add Period.)
X Passed Without Grade (Discontinued 1965; Treated as Satisfactory)

Repeated Courses
Repeated courses are counted in the IU grade point average (IU GPA) and may also be counted in the student's primary program GPA (Student Program GPA), depending on the policies of the student's program. Repeated courses do not count toward the earned hours required for degrees unless the course is defined as repeatable for credit. *****

Undergraduate Grade Point Average (GPA) Exception
Courses that have been retaken under the conditions of the FX Policy or Extended-X (Retaken Course/GPA Exclusion) Policy are noted with an "X" following the grade. Under these policies, both enrollments in the course and their grades remain on the record, but the enrollment of the "X" graded course is excluded from the University credit hour totals and grade point average (Indiana University Summary). This "X" grade may or may not be excluded from the academic program credit hours and grade point average (Student Program Summary) depending upon the policy of the student's primary program. Not all Indiana University campuses honor the Extended-X Policy. *****

II. *Record Format*
The "Official Transcript" standard format lists course history, grades and GPA information in chronological order sorted by the student's academic level. The "Official Transcript with Enrollment" provides the same information as the standard transcript but also includes all courses in which a student is currently enrolled. "Official Transcript" or "Official Transcript with Enrollment" (without an academic level designation) indicates that the document contains all work completed at Indiana University. A student may also request a transcript of only those courses taken at the undergraduate, graduate, or professional (Law, Medicine, Dentistry, Optometry) level. In these cases, the title of the document will reflect which academic level is represented. (Note: The graduate academic level may be subdivided into more than one "Graduate" grouping due to academic calendar differences.)

The IU GPA reflects the student's GPA according to standard university-wide rules. A Semester IU GPA and a cumulative-to-date IU GPA are calculated at the end of each semester. The overall IU GPA summary statistics are reflected at the end of each student career level.

The Student Program GPA is calculated according to the rules determined by the student's primary academic program at the time of printing. This GPA is subject to change whenever the student changes programs. The cumulative Student Program GPA summary statistics are reflected at the end of each student career level and are based on the student's last active primary program at that level.

III. *Transfer, Test, and Special Credit*
Courses accepted in transfer from other institutions are listed under a Transfer Credit heading. Generally, a grade of "T" (transfer grade) is assigned and course numbers, titles, and credit hours assigned reflect Indiana University equivalents. Transfer hours with a grade of "T" are not reflected in the cumulative grade averages. However, the hours are included in the "Hrs Earned" field.

A course suitable for credit which does not parallel an Indiana University course at the campus of evaluation may be designated by a course subject followed by "-UN" (undistributed credit) and a number indicating an equivalent Indiana University course (class) level. For example, HIST-UN 200 represents a 200 (sophomore) level History course. Applicability of accepted transfer credit toward a particular degree is determined by the Indiana University school or division offering the degree program.

Credit awarded as a result of placement tests, credit by examination, or successful completion of a higher level course may be reflected as Special Credit with a transcript note or may appear as separately designated "Test or Special Credit." The total number of transfer and test hours on the record appears in a separate Transfer/Test Hours Passed category in the Student Program and Indiana University Summaries.

Note that there are exceptions to these general transfer credit policies related to transfer work from Purdue University campuses and Purdue State Wide Technology programs located on Indiana University campuses. For further details visit **http://registrar.indiana.edu/transcript.html**, Transfer Credit Exceptions.

IV. *Accreditation*
Indiana University, a member of the North Central Association, is accredited by the Higher Learning Commission (http://www.ncahigherlearningcommission.org) (312-263-0456). Accreditation covers all courses and programs offered at all campuses of Indiana University. See the appropriate school bulletins for other accreditations.

V. *Validation*
A transcript issued by Indiana University reflects course work completed at any campus: Bloomington, Columbus (IUPUC), Fort Wayne (IPFW), Gary (Northwest), Indianapolis (IUPUI), Kokomo, New Albany (Southeast), Richmond (East), South Bend. A transcript issued by Indiana University is official when it displays the Registrar's signature and the university's seal and is printed on Indiana University paper. The official university transcript is printed on SCRIP-SAFE® paper and does not require a raised seal.

VI. *Registrar Contact*
Questions about the content of this record should be referred to the Office of the Registrar where it was printed.

IU Bloomington
Office of the Registrar
408 N. Union Street
Bloomington, IN 47405-3800
(812) 855-0121
http://registrar.indiana.edu
Federal School Code: 001809

IPFW Fort Wayne
Office of the Registrar
2101 E. Coliseum Boulevard
Fort Wayne, IN 46805-1499
(260) 481-6100
http://www.ipfw.edu/registrar/
Federal School Code: 001828

IU Kokomo
Office of the Registrar
2300 South Washington
P.O. Box 9003
Kokomo, IN 46904-9003
(765) 455-9391
http://www.iuk.edu/~koregstr
Federal School Code: 001814

IU South Bend
Office of the Registrar
Administration Building 148
1700 Mishawaka Avenue
P.O. Box 7111
South Bend, IN 46634-7111
(574) 520-4451
http://registrar.iusb.edu
Federal School Code: 001816

IU East
Office of the Registrar
2325 Chester Boulevard
Richmond, IN 47374-1289
(800) 959-3278
http://www.iue.edu/registrar/
Federal School Code: 001811

IUPUI Indianapolis
Office of the Registrar
Campus Center 250
420 University Boulevard
Indianapolis, IN 46202-5144
(317) 274-1519
http://registrar.iupui.edu
Federal School Code: 001813

IU Northwest
Office of the Registrar
Hawthorn Hall 109
3400 Broadway
Gary, IN 46408-1197
(219) 980-6815
http://www.iun.edu/~regisnw/
Federal School Code: 001815

IU Southeast
Office of the Registrar
University Center South, 107
New Albany, IN 47150-6405
(812) 941-2240
http://www.ius.edu/registrar/
Federal School Code: 001817

***** For a more detailed transcript explanation visit **http://registrar.indiana.edu/transcript.html**

13152513 SCRIP-SAFE® Security Products, Inc. Cincinnati, OH

R099/1212

Chelsea E. Dixon, Attorney-Advisor
Federal Facilities Enforcement Office
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW (MC 2261A)
Washington, DC 20460

May 1, 2021

To Whom it May Concern,

I am writing this letter in enthusiastic support of Evan Brown's application for a judicial clerkship position. I am an Attorney-Advisor in the Federal Facilities Enforcement Office in the Office of Enforcement and Compliance Assurance at EPA, as well as the office's Intern Coordinator. Evan was a full-time law clerk in my office for several months in the spring of 2021 and was an exceptional legal intern.

During his clerkship, Evan was assigned a variety of research, writing, and organizational projects, and he treated every assignment with enthusiasm and impressive attention to detail. He jumped into a complex area of environmental enforcement with no hesitation, and his work here helped to significantly advance our office's ongoing investigation and compliance efforts. Evan prepared a well-researched and thoughtful primer on the Department of Housing and Urban Development and relevant legal requirements relating to housing and lead, which will be enormously helpful to our office in the future. Evan also attended trainings during his semester in FFEO, including an introduction to the Part 22 rules of practice for EPA administrative enforcement actions. In addition, Evan wrote a helpful memo on how our office should classify inspections of State National Guard facilities by reviewing the case law and making note where strict adherence to the law would be impractical for inspection purposes.

Evan proved to be a talented legal intern and a wonderful addition to our office. He was unfailingly professional and good-humored throughout his time at EPA. I have complete confidence that Evan has the intellectual and personal skills that will make him an excellent law clerk.

If I can be of any further assistance in your review of Evan's application, please feel free to contact me.

Sincerely,

Chelsea E. Dixon

Chelsea E. Dixon

June 30, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing to strongly recommend Evan Brown as a judicial clerk. I had the pleasure of supervising Evan as an intern in the fall of 2020, and was impressed by his zealous advocacy, creativity, communication skills, and passion for applying the law to solve important social problems.

I was Evan's supervisor for a 10-week part time internship at CSPI during the fall of 2020, a period when the office was in full operation remotely due to the COVID-19 pandemic. Evan's work included drafting a citizens' petition to FDA urging adoption of regulations to control opiate contamination in poppy seeds, working on letters to the Surgeon General and the Alcohol and Tobacco Tax and Trade Bureau advocating for a cancer warning on alcohol labeling, and drafting an enforcement letter urging FDA to enforce its existing rules to prevent alcohol manufacturers from using vitamin claims to make alcohol appear healthier.

Evan stood out among interns I have supervised for his zealous advocacy, creativity, and strong communication skills. He was dedicated to finding creative solutions to accomplish public health goals, combing the statutes to identify plausible arguments for regulatory action and arguing persuasively for their application to the facts. I was also impressed with his skills at managing and communicating his work to ensure it met the needs of the organization, as well as with his performance in clearly, confidently, and succinctly explaining the work he had accomplished to impacted consumer stakeholders.

I highly recommend Evan as an excellent candidate for his strong legal skillset, ingenuity, and dedicated commitment to public interest. Please do not hesitate to reach out to me at ssorscher@cspinet.org, or 206-852-0957 with any further questions.

Sincerely,

Sarah Sorscher
Deputy Director of Regulatory Affairs
Center for Science in the Public Interest

May 10, 2021

To Whom it May Concern,

I am writing this letter in support of Evan Brown's application for a judicial law clerk position. I am currently an Attorney-Advisor in the Federal Facilities Enforcement Office in the Office of Enforcement and Compliance Assurance at the Environmental Protection Agency (FFEO), and I supervised several projects that Evan worked on during his internship at FFEO.

During his internship, Evan assisted on several projects for me, so I had first-hand experience with his research, writing, and oral presentation skills. Evan impressed me on one of the first projects assigned to him at FFEO. He was tasked with taking meeting minutes for an annual meeting between EPA and another federal agency. He prepared for his assignment by reviewing prior meeting minutes, the meeting agenda, and asked on point questions regarding how to prepare for his role as the sole person responsible for capturing the discussion. He transcribed his notes very quickly and I had very few suggested edits to the meeting minutes he prepared (which was a different experience from my review of meeting minutes from prior annual meetings). His contribution to that meeting was excellent.

Evan also did a very good job on his research and writing assignments on several projects he assisted me on this semester. He researched and prepared a memorandum on a legal question concerning small quantity handlers of universal waste under RCRA which was of great value to the case team. Evan also came up with a well thought out recommendation for how to classify state National Guard facilities after thoroughly researching the topic.

Overall, I found Evan engaged, eager to learn, and he asked good questions to make sure he understood the nuances of each project.

If you have any questions or I can be of assistance in your review of Evan's application, please feel free to contact me.

Sincerely,

Kathleen Doster
202-564-2573
doster.kathleen@epa.gov

This writing sample has been trimmed and edited for brevity

STATEMENT OF THE FACTS

Peach Tree Bank has provided financial services for the people of Atlanta for over a hundred years. R. at 21. Appellee Fleur is an environmental activist and artist. R. at 29. On August 1, 2018, Appellee accepted Peach Tree's offer to create artwork for display in Peach Tree's branch lobby. R. at 6.

Peach Tree employed Appellee through the work's completion in March of 2019. R. at 19. Prior to construction, Peach Tree determined Appellee's sketch of the work met its instructions and directed Appellee to proceed. R. at 10. Appellee constructed the work entirely "on site" in Peach Tree's branch office, R. at 18, working four days and 40 hours per week. R. at 10. Appellee followed Peach Tree's detailed directions that the work be a 12 feet tall triptych expressing an environmental theme through text on the side panels and imagery in the same style as Appellee's other works in the middle, and that it meet Peach Tree's weight requirements. R. at 6. Peach Tree also invested up to $100,000 in tools for Appellee's use. *Id.* Peach Tree paid taxes on Appellee's compensation, which was paid in two installments and did not include benefits. *Id.* The completed work cannot be moved without damage because Appellee chose to use "delicate" paint. R. at 19.

On November 17, 2018, Appellee was arrested for flying drones in restricted airspace above Heathrow Airport in a demonstration against pollution. R. at 29.

Soon after, some of Appellee's fans began to ratchet up their own demonstrations. In a social media post two days after Appellee's protest, a fan tags Appellee's work next to an image

of a building engulfed in flames with the caption "Protect your mother. At any cost." R. at 37. Less than a month later, hundreds of Appellee's activist fans assembled around Peach Tree Bank. R. at 21–23, 27, 33. Since then, Appellee's fans have physically assaulted people on Peach Tree's premises. *Id.* They have created hazardous conditions by blocking exits and forced their message onto everyone captive in the bank when they demonstrate. R. at 21. This violence continues to beset Peach Tree Bank and its patrons. R. at 21–22.

Regarding Appellee's work itself, the reviews skew negative. The Senior Curator of the Los Angeles Museum of Contemporary Art called the work "ominou[s]" and, aside from the center panel, "basically unremarkable at its core." R. at 32. At trial, Peach Tree's expert, who holds a Ph.D in Art History and Critical Art Theory, testified the work was "garden variety corporate lobby art that in the long run will lose its popular cache and will not be recognized as anything approaching quality art." R. at 3. Appellee's expert personally enjoys the work but admitted the work is not currently one "the art community recognizes as significant," and could only speculate it might be "one day[.]" Only two other publications in the record praise Appellee's work. One is in an advertisement in a Delta airline magazine. R. at 30. The other comes from Jayden Freeman, a curator in Charlotte who described the work merely as "destination art," "design[ed] art for banks." R. at 31. The social media post from Appellee's fan described above does not even comment on Appellee's work substantively. R. at 37. Another post from a verified local art critic says Appellee's work "disappoints" and suggests it has brought Appellee's career "to an end[.]" R. at 35.

Peach Tree has exhausted its available security mechanisms to contain the violence on its premises. R. at 33. Peach Tree's only remaining option is to remove the work. R. at 21–22.

ARGUMENT

The district court erred in issuing a preliminary injunction because Appellee did not prove the four necessary elements. A court can only grant a preliminary injunction when Appellee proves each of the following: 1) A substantial likelihood of success on the merits; 2) Irreparable injury will follow unless the injunction issues; 3) Appellant will not suffer damage that outweighs Appellee's injury if the injunction issues; and 4) The injunction would not be adverse to public interest. *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998). The court must reverse a preliminary injunction granted in an "abuse of discretion." *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 646, 664 (2004). "[P]ure question[s] of fact [are] subject to clearly erroneous standard of review." *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982). "[L]egal questions and mixed questions of law and fact are reviewed *de novo*." *Brownlee v. Haley*, 306 F.3d 1043, 1058 (11th Cir. 2002).

Appellee did not prove a substantial likelihood of success on the merits because her work is not covered by VARA. Appellee did not prove an irreparable injury because Appellee would suffer no legally recognized injury if the injunction were not issued. Appellee did not prove her alleged injury outweighs damage to Peach Tree because an injunction would subject the public to violent protest on Peach Tree's premises. Finally, because the work endangers the public in this way, Appellee did not prove granting an injunction would not be adverse to public interest.

I. Appellee's work lacks "recognized stature" because it is not viewed as high quality work, is only popular for its message, and protecting it would threaten legitimate property rights.

A. Recognized Stature

Appellee's work is not covered under VARA because VARA only covers work Appellee can prove has "recognized stature." 17 U.S.C. § 106A(a)(3)(B) (2018).

At a minimum, artwork must be generally viewed as high quality by experts to have "recognized stature." *See Carter v. Helmsley-Spear*, 861 F. Supp. 303 (S.D.N.Y. 1994) (*"Carter I"*). In the most cited case among VARA decisions, the court declared artwork must "have 'stature,' i.e. be viewed as meritorious" by "art experts, other members of the artistic community, or some cross-section of society" to be protected. *Id.* at 325–26 (artwork had "recognized stature" when multiple experts praised its coherence, uniqueness, and conceptual imagination). The Seventh Circuit went on to adopt the *Carter* test in *Martin v. City of Indianapolis*, in which the court found a steel sculpture had "recognized stature" based on reviews in newspaper and magazine articles, a letter from a local art gallery director, and a letter to the editor of *The Indianapolis News*, all of which praised the artwork. 192 F.3d 608, 612 (7th Cir. 1999).

Without expert support, popularity alone does not establish a work is high quality. *See Castillo v. G&M Realty L.P.*, 950 F.3d 155 (2nd Cir. 2020). In finding popular aerosol works were covered under VARA, the Second Circuit did not stop at the work's popularity, but rather endorsed the *Carter* test in declaring, "the most important component of stature will generally be artistic quality" before reviewing expert testimony. *Id.* at 166, 170 (2nd Cir. 2020) (finding popular aerosols had "recognized stature" when expert testimony established they "reflect[ed] striking technical and artistic mastery").

This narrow standard of "recognized stature" appropriately balances VARA's purpose of preserving artwork with legitimate property interests. Congress went "to extreme lengths to very narrowly define the works of art that [are] covered." H.R. Rep No. 101-514, at 6921 (1990). By setting the standard too low, "courts risk alienating those ...whose legitimate property interests are curtailed." Christopher J. Robinson, *The "Recognized Stature" Standard in the Visual Artists Rights Act*, 68 Fordham L. Rev 1935, 1968 (2000). The *Carter I* court observed this risk when it

referred to "recognized stature" as a "gate-keeping mechanism." 861 F. Supp. at 325. Courts should reject standards that speculate on the work's potential to achieve "recognized stature," which render art owners "the perpetual curator of a piece of visual art that has lost (or perhaps never had) its luster." *Martin v. City of Indianapolis*, 192 F.3d 608, 616 (7th Cir. 1999) (Manion, J. dissenting in part).

Appellee's work lacks "recognized stature" because art authorities do not generally view it as high quality work. The *Castillo* court found aerosols had "recognized stature" based on expert testimony that the artwork "reflect[ed] striking technical and artistic mastery". 950 F.3d at 166. Unlike the artwork in *Castillo*, the art community generally finds Appellee's work to be of unexceptional quality. Dr. Rothschild, a Ph.D in Art History and Critical Art Theory, testified Appellee's work was "garden variety[.]" R. at 3. The Senior Curator of the Los Angeles Museum of Contemporary Art criticized it as "basically unremarkable at its core." R. at 32. Although Appellee's expert personally enjoys the work, she admitted the work is not currently one "the art community recognizes as significant." R. at 2. The only other positive reviewers do not come close to counterbalancing these negative reviews. The Delta magazine only uses Appellee's work as a selling point to get readers to "take advantage of Delta's great fares to Atlanta," R. at 30, and is far from an art authority. The Charlotte art curator cabins Appellee's work as "destination art." R. at 31. Appellee's work, to him, is simply a tourist attraction "for banks." *Id.*

Even under the least rigorous version of the *Carter* test as adopted by the Seventh Circuit, Appellee's work would not qualify. Whereas the work in *Martin* was uniformly praised in publications and letters, including those of art authorities, 192 F.3d at 612, Appellee's work has received a great deal of negative reviews in publications and in sworn testimony, as described